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INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

BISHEN CHAND BASAWUT . . . . DEFENDANT; J. C.* 1887

AND

SYED NADIR HOSSEIN . . . . . PLAINTIFF. *Nov.* 23, 24, 25.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Sale in Execution—Property subject to Religious Trusts—Trustee beneficially interested in unascertained Surplus.

Where property had been devised to a trustee with the object of providing for certain religious duties, *held*, that neither the whole nor any portion of the *corpus* could be sold in execution of a decree against the trustee personally.

Held, further, that in a suit to set aside such execution in which all parties interested are not present, the Court cannot decide as to the extent of the religious trusts, or whether any surplus profit belongs to the trustee, nor allow any specific portion of the *corpus* of the estate to pass to a purchaser as representing such unascertained surplus.

APPEAL from a decree of the High Court (May 28, 1883) reversing a decree of the Subordinate Judge of *Moorshedabad* (Feb. 19, 1881), whereby the suit of the Respondent had been dismissed.

The Respondent by his suit sought to set aside certain proceedings which had been taken by the Appellant, whereby the property in dispute had been seized in execution of a decree obtained against a former-holder of the property, named *Mahomed Ali*. The Plaintiff contended that the property was held by

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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himself and by *Mahomed Ali* in trust for religious purposes, and, as such, was not liable for the personal debts of the last trustee. The original Court held that the property was held by *Mahomed Ali* for his own benefit, subject to certain trusts of a religious nature, and that this beneficial ownership was liable to be seized in his own hands, and in the hands of his successor, for his personal debts. This decision was reversed by the High Court, which held that although there was a margin of profit, after satisfying the trusts, which might be properly applicable to the claims of the execution creditor, still the property itself could not be attached to satisfy the debts of a former trustee.

The facts of the case are stated in the judgment of their Lordships.

On the 13th of April, 1859, *Khairunnissa* executed a wasjatnamah, which, according to the sub-Judge, literally means a written testament under the Mahomedan law, in favour of her grandson *Mahomed Ali*. By this document, after reciting that she had been accustomed to defray the taziadari, mujlis (meetings), and abdarkhana (water supply) expenses from the proceeds of the zemindaries in pergunnah *Bansdowl*, that she was anxious that these should be kept up in perpetuity, and that she had no confidence in her son *Enayet Ali*, and that it was necessary she should appoint a wasi (trustee and administrator), for the purpose of carrying out the important works of the taziadari, &c., she proceeded as follows:—

"I therefore appoint in respect of the whole and entire of these zemindaries, gardens, buildings, and my whole property, my grandson, *Mirza Mahomed Ali Beg*, who is intelligent, fit, faithful, honest, a shrewd man of business, to be trustee, and deliver and entrust to him my property on the following terms:—That the said trustee shall, after my death, in accordance with the customs prevailing among those professing the Mahomedan faith and religion, cause the performance of and provide for all rites for the invocation of blessings, interments, and sepulture, hajj (pilgrimages): taziadari, mujlis, sepulchral expenses, &c., from the property above described, after paying the Government revenue to the collectorate from the proceeds of the above pergunnah as per schedule below; and from whatever surplus shall remain, he

will draw as trustee's due a monthly sum of Rs.40, and he will pay a monthly sum of Rs.100, new coinage, to *Mirza Enait Ali Beg*, my son, and of Rs.60 to *Mobaruckunnissa Khanum*, my daughter, and pay for repairs of the buildings aforesaid. The rent of the gardens, &c, and the wages of servants and employés, gardener, &c., will be paid by the said trustee, and in it the said trustee will pay, and the zemindaries and property of me, declarant, will never be divided or partitioned by butwara between my heirs, and they will always remain in the hands and under the control of the aforesaid trustee, and the management thereof will remain with the said trustee; none of the heirs have or shall have, contrary to the terms of the trust, any power to cause a partition of my property: and the management and provision for all things above specified will be done by the said trustee, and the taking of accounts and entering into investigations and superintending all matters connected with the pergunnah aforesaid will be the work of the aforesaid trustee. In all these transactions none of my heirs shall exercise the least power, and they shall have no power to call anyone to account; none of my heirs shall have any power to call for or take accounts from the trustee aforesaid. The whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him; and the dishonesty of the said trustee, when complained of by any of my heirs before any authority for the time being, will be disallowed, and there will be no sort of dishonesty on the part of the said trustee."

On the 20th of May, 1868, *Mahomed Ali* executed a second wasiatnamah in favour of the Respondent. There was a later one executed by *Mobaruckunnissa* shortly before her death, but it was never registered.

The Subordinate Judge found that the first wasiat was in fact executed by *Khairunnissa*, but not with an intelligent knowledge of its nature. He held that it was not a deed converting the property into a religious endowment, but a will burthening the property, in the hands of the heirs, with certain charges for religious objects. As a will, he found that it was only valid to

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the extent of one-third of the property, being made without the consent of the heirs. He was of opinion that the second wasiat merely continued the trusts created by the former instrument, and that as regards any beneficiary interest then possessed by *Mahomed Ali*, it was void as against his creditors, he being then insolvent. The result of these findings was, that the larger part of the estate was the private property of *Mahomed Ali*, during his life, and after his death was assets in the hands of his heirs, for the payment of his debts.

The High Court held that the effect of the first wasiatnamah, which it found had been executed by *Khairunnissa* with a full knowledge of its contents, was to vest not merely one-third, but the whole of the property transferred in *Mahomed Ali*, subject to the trusts of the deed, which were for certain specified purposes. The High Court also held with regard to the second wasiatnamah that by it *Mahomed Ali*, acting within the implied power conferred by the earlier deed, appointed a successor to carry out the directions of the trust. It concluded: "If the trust be good, the Plaintiff is entitled to hold the property subject to the charges of the trust, and to the claims of his creditors to any margin of profit, if there be one, which can be shewn to be his personal property. But the creditor of *Mahomed Ali* has, it appears to us, no right to attach the property in the hands of the present trustee, in order to enforce a money decree against a former trustee, which could never have been enforced, except against the margin of profits, which, after performance of the trusts, remained in his hands."

Doyne, and *Mayne*, for the Appellant, contended that the legal legal effect of the first document was to vest, so far as *Khairunnissa* could lawfully do so, the whole property in *Mahomed Ali* absolutely for his own personal benefit subject to the trusts specified therein. As regards the second document, dated in May, 1868, it was contended that it did not vest any interest in the Respondent; that at the outside it merely gave him a right to manage the estate for the purpose of discharging certain religious duties out of the income, and that the whole residue of the estate passed to the heirs of *Mahomed Ali*. Besides, as *Mahomed Ali* was insolvent in 1868 the deed was void and in-

operative as against creditors so far as it purported to affect any beneficial interest that he had therein. Neither of these two documents was capable of creating a valid wakf under Mahomedan law. Reference was made to *Baillie's* Mahomedan Law, part 2, Imameea, p. 211, tit. "wakf." [*Branson* referred to *Tagore* Law Lectures, 1874, pp. 463, 472.] *Macnaghten's* Mahomedan Law, p. 69 (2nd ed.), and Precedents, pp. 327, 340, case 8. The appropriator must divest himself of the property. A mutwali is generally appointed, here a wasi was appointed. His right, title, and interest were attached. [SIR RICHARD COUCH:—Was not the estate attached under the new Code which provides that the property itself should be attached.] See sects. 267, 264, 286, and 287 of Act XIV. of 1882, the now provisions corresponding to sect. 249 of Act VIII. of 1859. Also sect. 278: *Austutosh Dutt* v. *Doorgachurn Chatterjee* (1). [SIR BARNES PEACOCK:—If you had specified in your application for sale what would you have said?] What remained after defraying the expenses of the trust. [LORD HOBHOUSE:—That would have involved a suit to declare and administer the trust and ascertain the surplus, and in that suit all parties interested must be before the Court.] This property vested in *Mahomed Ali* subject to certain trusts, and subject thereto it was property which *Mahomed Ali* could have sold, consequently it can be seized and sold *in invitum*. Some of the trusts were purely secular. Some of them were precatory and not enforceable: see *Moohummud Sulik* v. *Moohunmud Ali* (2); *Sir Jamsetjee Jijibhai* v. *Sonabai* (3); *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (4); *Bebee Kuneez Fatima* v. *Bibee Saheeba Jan* (5); *Dalrymple* v. *Khoondkar Azeezul Islam* (6); *Khajah Surwar Hossein* v. *Khajah Syed Hossein Khan* (7); *Mahomed Munnoo Chowdhree* v. *Musst. Hajra Beebee* (8). If heritable property is burdened with trusts it is nevertheless capable of sale: *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (9); *Basoo Dhul* v. *Kishenchunder Geer Gossain* (10); *Carvalho* v. *Burn* (11).

(1) Law Rep. 6 Ind. Ap. 182, 184.
(2) 1 Sel. Rep. 17.
(3) 2 Bomb H. C. R. 133.
(4) 2 Moore's Ind. Ap. Ca. 390.
(5) 8 Suth. W. R. 313.
(6) S. D. A. (1858), p. 586.
(7) S. D. A. (1858), p. 1028.
(8) S. D. A. (1858), p. 1218.
(9) 10 Suth. W. R. 299.
(10) 13 Suth. W. R. 200.
(11) 4 B. & A. 382, 393.

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Branson, for the Respondent, was not called upon.

1887. Nov. 25. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

In a suit filed in the Court of the Subordinate Judge the Plaintiff prayed that an order passed in certain execution cases might be reversed and set aside.

The Defendant, as the purchaser of a decree which had been made against *Mahomed Ali*, obtained an order in execution against the heirs, or persons alleged to be the heirs of *Mahomed Ali*, for the attachment of certain property which he alleged to be the assets of *Mahomed Ali*. The Plaintiff objected to the attachment of the property, and the present suit was brought to set aside the order.

The facts of the case are these: a Mahomedan lady named *Khairunnissa*, who had an absolute interest in the property, executed a document called a will, or a deed, which is set out in the record. By that document she devised the property to her grandson, *Mahomed Ali*, upon trust for the performance of certain religious duties and ceremonies in accordance with the Mahomedan religion. A question was raised whether the trust so created amounted to what in Mahomedan Law is called a wakf, or whether it was merely a trust for the performance of religious duties. The High Court held that it was at any rate a trust for the performance of religious duties, and that a trustee had been appointed for the performance of them by *Khairunnissa*, and that a subsequent trustee had been appointed by that trustee. It is unnecessary to specify the various religious duties for the performance of which this trust was created. Many of them, such as the taziadari and others, were specified in a schedule to the deed, with the expenses set opposite, amounting altogether to Rs.1412. There was also a sum to be paid to her son *Mirza Enait Ali Beg*, Rs 100 per mensem, or yearly Rs.1200, and to her daughter *Mobaruckunnissa Khanum*. Rs.60 per mensem, or yearly Rs 720.' Those two legacies have lapsed by death. Then there is—"trustee's allowance of *Mirza Mahomed Ali Beg* at Rs.40 per mensem, or yearly Rs.480;" and then there are other items for

wages. At the end of the document, after specifying the trusts, it was declared that "The whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him."

Khairunnissa died in the year 1859, leaving her son, *Enait Ali*, who lived until the 5th of February, 1860, and her daughter, *Mobaruckunnissa*, who died on the 23rd of April, 1869. It was contended that this document, being the will of *Khairunnissa*, she could not dispose of more than one-third of her interest in the estate, and that the other two-thirds went to her heirs-at-law, her heirs-at-law at the time of her death, in 1859, being *Enait Ali*, her son, and *Mobaruckunnissa*, her daughter. Their Lordships consider it unnecessary to decide whether the instrument was a will or a deed. Upon the death of *Enait Ali*, *Mahomed Ali*, who had been appointed the trustee by *Khairunnissa*, was his heir-at-law. It appears that after the death of *Khairunnissa*, *Enait Ali* made some claim as heir to his share of the property which he said his mother could not dispose of. *Mahomed Ali*, on the other hand, contended that the will of his grandmother was a valid one; that the whole of the property passed under that document to himself, and did not vest in his father, and that his grandmother had the right to dispose of the whole of the property. *Mahomed Ali* never claimed upon the death of *Enait* to succeed to any portion of the property as having been undisposed of by his grandmother, but during the whole of his life treated the property of his grandmother as having been disposed of by her will for the purposes therein expressed. He could not therefore in his lifetime have claimed any portion of the estate as heir to his father *Enait*. *Mobaruckunnissa*, as already observed, died on the 23rd of April, 1869, and neither she nor any of her heirs have ever claimed to be entitled to any portion of the property as not having been disposed of by *Khairunnissa*.

The Defendant in the suit claimed under a purchase in execution of a decree against *Mahomed Ali*, dated in 1863, to have the whole of the property sold in execution of that decree against the heirs-at-law of *Mahomed Ali*, the trustee. The case came on to be

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heard before the Subordinate Judge, who was the Judge sitting in the Court of Execution, and after various proceedings and objections, it was ordered that the property should be attached. It was objected that the judgment creditor could not attach the whole property, and that he had not specified any particular portion of it. The Judge, speaking of the residuary interest of the deceased *Mahomed Ali Beg* as the property liable to be attached, said: "As there is yet time to ascertain the nature of the interest under sect. 287, Civil Procedure Code, previous to the issue of the writ of proclamation, I think the claimant's objection on the score of the attachment being void for want of specification of the debtor's interest is untenable." He therefore disallowed the objection and so in effect maintained the order which had been made for the attachment of the entire *corpus* of the estate.

One of the learned counsel for the Appellant very properly admitted that no specific portion of the *corpus* could be sold, but that the whole *corpus* of the estate was liable to be sold. The High Court held that the *corpus* of the estate was not liable to be sold, and they say: "Nor is it essential to decide whether the property became what is known technically as wakf, and whether *Mahomed Ali* became mutwali, because the Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies that the trustee for the time being is entitled to hold the property subject to the performance of the duties charged upon it. There may have been in *Mahomed Ali's* time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee; but that is not the question now. The question is, whether *Mahomed Ali's* creditor is entitled to attach the property itself in the hands of the Plaintiff."

If the whole property is to be sold, it must be taken out of the hands of the trustee altogether, and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might of any other religion. It surely cannot be contended that property, devised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that

the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him, as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan Law? for example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindus and Mahomedans at the time of the Mohurrum. The High Court says: "If there was a margin of profit, that margin of profit might possibly have been attached." Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts would belong to *Mahomed Ali* or the trustee substituted by him. The *corpus* of the estate cannot be sold, nor can any specific portion of the *corpus* of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties.

According to sect. 266 of the Civil Procedure Code, Act X. of 1877, which was the Code in force at the time when these execution proceedings were going on, the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, or other buildings; goods, money, bank-notes, and so on. Then, "shares in the capital or joint stock of any railway company or other public company or corporation; and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit, and whether the same be held in the name of the judgment debtor, or by another person in trust for him or on his behalf." If there was any surplus in

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the hands of the trustee for the benefit of the judgment debtor it would not entitle the judgment creditor to attach and sell the whole or any specific portion of the *corpus* of the estate. He could only attach that property over which the judgment debtor had a disposing power, which he might exercise for his own benefit, "whether the same was held in the name of the judgment creditor, or by another person in trust for him."

Mahomed Ali, just before his death, executed a deed, which says: "I appoint my sister's son, *Nadir Hossein*"—who is the present Plaintiff—"for the purpose of carrying on the duties specified in the former wasiutnamah, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the wasiutnamah of the late *Khairunnissa Khanum Saheba*, and of this wasiutnamah, take care of, maintain, and keep the whole of the property, necessaries for lighting, silver and gold articles of all sorts, belonging to the emambara" and all the other religious duties. He is to be the trustee for carrying out the religious ceremonies which had been appointed by *Khairunnissa* under the wasiutnamah. It was contended that if this was not a wakf, the trustee appointed by *Khairunnissa* had no power to appoint a new trustee. But even if *Mahomed Ali* could not appoint a trustee in his place, no one has ever objected to *Syed Nadir Hossein* as the trustee. If there had been any objection that he was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed, and a new trustee appointed by the Court under the Code of 1877. But *Syed Nadir Hossein* was in possession as trustee, and no person interested in the performance of the religious duties had ever objected. Even if there had been an objection, that would not have converted the *corpus* of the property held in trust into *Mahomed Ali's* own private property, liable to be attached for his private debts. By sect. 280 of the Code of Civil Procedure, Act No. X. of 1877, it is enacted that:—"If upon the investigation the Court is satisfied that for the reasons stated"—that is, upon the investigation of the claim of an objector—"in the claim or objection such property was not when attached in the possession

of the judgment debtor, or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment debtor at such time it was in his possession not on his own account, or his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order releasing the property wholly, or to such extent as it thinks fit, from attachment." Sect. 381 enacts, "That if the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupation of a tenant, or other person paying rent to him, the Court shall disallow the claim."

Their Lordships are of opinion that the order for the attachment of the *corpus* of the estate was erroneous, and that a proclamation could not have been lawfully issued for the sale of any portion of the property attached.

Their Lordships are of opinion that the judgment of the High Court was right, and they will therefore humbly advise Her Majesty to dismiss this appeal and to affirm that judgment. The costs of the appeal must be paid by the Appellant.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondent: *Lambert, Petch, & Shakespear.*

J. C.* 1887 Dec. 3.

NAWAB ZAIN-UL-ABDIN KHAN . . . PLAINTIFF;

AND

MUHAMMAD ASGHAR ALI KHAN AND OTHERS . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Execution Sale—Purchase by Decree-holder—Reversal of Decree.

Decree-holders who purchase under their own decree, which is afterwards reversed on appeal, stand in a different position from strangers who purchase thereunder *bonâ fide*, while the decree and the order for sale are valid. The latter have only to ascertain that the decree and order are valid and they are entitled to retain their purchase; the former lose the benefit thereof on the reversal of their decree.

APPEAL from a decree of the High Court (June 11, 1883), in two appeals which reversed a decree of the Subordinate Judge of *Moradabad* (March 16, 1882).

The question in this appeal was whether certain auction sales of property formerly in the possession of the Plaintiff, made by order of the Court in the year 1874 and two following years, could be invalidated, the decree under which such sales took place having been subsequently modified in appeal, and as to whether or not the claim for invalidation of such sales was barred by limitation.

The facts are stated in the judgment of their Lordships.

The judgment of the High Court was as follows:—

"Two pleas were urged before us at the hearing—first, that the substantial relief prayed in the suit being to have the auction-sales of November, 1874, 1875, and 1876 set aside, it is barred by limitation, whether we look to art. 14 of Act IX. of 1871, or to art. 12 of Act XV. of 1877; secondly, that the Appellants, either themselves being or representing the auction-purchasers at such sales, which have never been set aside, have acquired an indefeasible title to the property sought to be recovered and the Plaintiff-Respondent has no cause of action.

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

"It appears to us unnecessary to discuss the soundness or otherwise of this latter contention, as the first ground relied on by the Appellants, is, in our opinion, a valid one, and fatal to the maintenance of the suit. The only way in which the Plaintiff can claim to assail the title of the Defendants is by obtaining the cancelment of the sales at which the latter purchased; and so long as those sales stand good, their position is unimpeachable. In short, the Plaintiff cannot secure the main object of his suit, namely, possession of the properties, until he has had the sales set aside, which is virtually what is asked by the plaint. We think, therefore, that whether the old or the new limitation law is applicable, the suit is barred by limitation and cannot be entertained."

Cowie, Q.C., and *Arathoon*, for the Appellant.

Doyne, and *Raikes*, for the Respondents.

Reference was made to *Sahibzada Zeinulabdin Khan* v. *Sahibzada Ahmed Raza Khan and Others* (1); *Jadunath Koondu Chowdhry* v. *Brojanath Kundu* (2); *Kunhaye Singh* v. *Oomadhur Butt* (3); *Abdul Haye* v. *Nawab Raj* (4).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

In this case the Plaintiff sued several Defendants, claiming to set aside certain auction sales which had taken place under a decree of the Subordinate Judge of *Moradabad*, and for an order that the Plaintiffs be put into absolute possession of the properties which were sold, and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several Defendants as regards the properties of which they were severally purchasers.

Some of the Defendants were the decree-holders, and some were persons who came in under them; but all the Defendants

(1) Law Rep. 5 Ind. Ap. 233.
(2) 6 Beng. L. R. Appendix, p. 90.
(3) 21 Suth. W. R. 291.
(4) Beng. L. R. Suppl. F. B. at p. 911.

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who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the Defendants were not decree-holders, but merely purchasers under the execution, and strangers to the decree upon which the execution issued. The circumstances are peculiar. The Plaintiffs in the suit in which the execution was issued sued the present Appellant in the Court of the Subordinate Judge of *Moradabad* to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present Appellant to the Plaintiffs in that suit, and a large amount alleged to be due from the Appellant as dower to their mother, whom they represented. The Defendant in that suit—the present Appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then Defendant, was not a resident in the district of *Moradabad*, but a resident in foreign territory, namely, *Jaipur*. But the Subordinate Judge decided that he had jurisdiction, and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes, and on account of the dower.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court, and remanded the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge, in respect of the dower, and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court, which reversed a part of the original judgment of the Subordinate Judge, the Plaintiffs in that suit, who are now some of the Defendants, executed their decree, and several sales took place under that execution. Under

the first sale a certain amount was realised which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the Defendants, *Ashgar Ali*, purchased *bonâ fide*, he not being a party to the original decree.

The Plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other Defendants were added. The entry on the record is as follows: "According to the order dated the 17th of January, 1882, *Har Sarup*, *Parshadi Lal* and *Jiwa Ram*, auction purchasers, were joined as Defendants." The three Defendants who were then joined were no parties to the decree, so that there are two sets of Defendants in the suit: the decree-holders who purchased under their own execution; *Ashgar Ali*, who purchased a portion of the property of the Plaintiff, being a *bonâ fide* purchaser and a stranger to the decree; and the three other Defendants, who were alleged to be auction purchasers under the decree, and who were no parties to it.

The Plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on the 20th of November, 1874, 20th of November, 1875, and 15th of November, 1876, be declared null and void, and the sale deed in favour of *Shaukat Hosain Khan*, dated the 2nd of November, 1880, so far as it appertains to the Plaintiff's claim, be set aside." Thus he claimed to set aside all the auction sales, not only as against the decree-holders who had purchased, but as against *bonâ fide* purchasers who were no parties to the decree. Secondly, he claimed that "Plaintiff be put in absolute possession of the under-mentioned property of the value of Rs.21,450 after dispossession of the Defendants."

Amongst other issues, one was whether the auction sale and the purchase having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under

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their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. In *Bacon's* Abridgment, tit. "Error" it is laid down, citing old authorities, that "If a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at *Calcutta*. They are collected in a note in *Broughton*, in his book on the Code of Civil Procedure, 4th Ed., note to sect. 246, Act VIII. of 1859. So in this case, those *bonâ fide* purchasers who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the Defendants were bound to restore the property; not only the decree-holders who had purchased, but the Defendants who had purchased *bonâ fide*, not being parties to the decree. In his judgment he says, "The limitation period of one year has nothing to do with this case. The cause of action having accrued to Plaintiff on the 1st of March, 1880, the date when the decision was modified, and as he instituted the claim on the 22nd of February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the Plaintiff had a right to recover, not only as against the decree-holders, but as against the *bonâ fide* purchasers, who were no parties to the decree under which they purchased, and he decreed the Plaintiff's suit. The Defendant *Ashgar Ali* and the three added Defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that

decision. They passed two decrees, one as regards the three Appellants who were the added Defendants, and the other as against *Ashgar Ali*; but they are both in similar words. They said, "Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the Plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the Plaintiff's claim was dismissed, not only as regards the Defendants who had appealed, but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the Defendants who had appealed and whose appeals were decreed, and not to the Defendants who had not appealed, and who were not before the Court, and had not objected to the decision of the Subordinate Judge.

Their Lordships, therefore, will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the Plaintiff only so far as his suit related to the Defendants who had appealed to the Court; and that being so treated, they ought to be affirmed, and that the decree of the Subordinate Judge should be reversed, so far only as it related to the Plaintiff's claim against those Defendants. Their Lordships also think that the Appellant must pay the costs of the Respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court, they treat them merely as decrees in favour of the Defendants who were Appellants to the High Court.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondents: *Oehme & Summerhays.*

J. C.* 1887 Dec. 1, 6, 7.

TEKAIT KALI PERSHAD SINGH AND ANOTHER . . . . . } PLAINTIFFS;

AND

ANUND ROY AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ghatwali Tenures—Ghatwal's Power of Alienation—Sale of Ghatwali Tenure in Execution.

Held, that a ghatwali tenure in *Kharagpore* is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar. An absolute power of alienation forms an integral portion of the ghatwal's right and interest in the ghatwali.

APPEAL from a decree of the High Court (April 21, 1884), reversing a decree of the Subordinate Judge of *Bhagulpore* (Feb. 13, 1882), and dismissing with costs the suit of the Appellants which the Subordinate Judge had decreed to the extent of two-thirds the claim made by the plaint to recover possession of a ghatwali mehal, named *Kharna*.

The facts of the case are stated in the judgment of their Lordships.

The Subordinate Judge held that the tenure in dispute was a perpetual ancestral right at a prescribed jumma of the father of the Plaintiff, joined to which was also the condition of the performance of service; and that so long as he was ready to perform the service relating thereto, the zemindar had neither the power to dispossess him, nor to enhance the rent, and that, in such state of things, up to this time, no change or alteration had taken place. He also held that the tenure was indivisible; that it was transferable, subject to approval of the zemindar, but that no such practice or usage had been proved that the holder of a ghatwali tenure had an absolute power of alienation.

With regard to the rights of the parties in the said tenure, he held: (1.) That it was not disputed that the family of the judg-

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

ment debtor *Megraj Singh* were governed by the Mitakshara law. (2.) That notwithstanding that the tenure was indivisible the estate of the tenant therein was joint, though the possession was exclusive. Consequently *Megraj Sing* had no exclusive right, after the birth of Plaintiff No. 1, to the ancestral mehal in dispute, nor had he any right to transfer the same absolutely, without his son's consent. (3.) That "in the deed covering the debt for which the sale was held, only the father of Plaintiff No. 1 was the party;" that the suit and decree were against him personally; and that only his right and interest in the mehal were sold and bought. (4.) That the custom of the eldest son succeeding to the "guddi" had been prevailing in the family of the judgment debtor since a long time without any change or alteration.

Both parties appealed to the High Court, which, after observing that "It seems clear either that the Plaintiff should have recovered the whole tenure, or that the suit should have been dismissed altogether," proceeded as follows:—"The real and only material questions for us to decide are, first, whether the sale of this ghatwali in execution of a decree against the ghatwal was invalid and liable to be set aside by reason of the tenure being in its nature inalienable; and, secondly, if the alienation was bad, are the present Plaintiffs entitled to recover the property. The second question also involves one of limitation.

"As to the first question, there is doubtless authority for holding that ghatwali lands are not alienable either at the pleasure of the ghatwal for the time being, or for the payment of his debts at the pleasure of his creditors. For the nature of the tenure and the reason of its existence render it necessary that the holder of the office of ghatwal be secured in his enjoyment of the tenure.

"The principal case cited to us by the learned Advocate-General for the Plaintiffs is that of *Raja Nilmoni Singh* v. *Bukra Nath Singh* (1). But in that case the particular point decided by the Judicial Committee of the Privy Council was that ghatwali lands could not be seized in execution of a decree for the debts of a former ghatwal as assets by descent in the hands of his successors. Their Lordships, however, expressed an opinion that the

(1) Law Rep. 9 Ind. Ap. 104.

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same considerations on which the ghatwali should be held to be indivisible, would make it inalienable. That case related to a jagir in *West Burdwan* to which police services were attached, and it was considered to be analogous to one of the *Birbhoom* ghatwalis, governed by Regulation XXIX. of 1814.

"Another case was cited to us, in which a Division Bench of this Court held in a second appeal, No. 2451 of 1880, that a shikmi ghatwali could not be seized in execution of a decree for debt. That, too, was a *Birbhoom* ghatwali, and the objection was taken by the shikmi ghatwal before any decree was obtained.

"The ghatwali in the present case is one of the *Kharagpore* ghatwalis, and as regards these, the Judicial Committee noted, without expressing dissent, that transfers have taken place, and have been recognised if made with the assent of the zemindar, while without that consent the Court has not recognised them. Precedents for these propositions are to be found in two cases mentioned by the Lower Court, *Raja Leelanund Singh* v. *Doorgabutty* (1), and *Lalla Gooman Singh* v. *H. Grant* (2). These decisions have not been overruled; but the Judicial Committee point out this distinction between the ghatwals of *Birbhoom* and of *Kharagpore*, that the former are appointed by Government, and the latter by the zemindar.

"As to the *Birbhoom* ghatwals, Regulation XXIX. of 1814 expressly provides that they and their descendants in perpetuity shall be maintained in possession of the lands so long as they pay their revenue and fulfil the other obligations of their tenure.

It has been argued that the *Kharagpore* ghatwals are on the same footing as those of *Birbhoom*, but this does not appear to be the case; for, besides, there being no statutory provision in their favour, it appears from a description given of their status in the judgment of the Privy Council in the case of *Raja Lelanund Singh* v. *Government of Bengal* (3), that the zemindar retained in his hands the power of appointing and dismissing the ghatwals in case of their not performing the duties. This seems to negative any right to hold from generation to generation on payment of the rent reserved. Be that as it may, we think that we must

(1) Suth. W. R. 1864, 239. (2) 11 Suth. W. R. 292.
(3) 6 Moore's Ind. Ap. Ca. 101.

hold, upon the authority of the cases and upon the evidence of many such transfers having been effected and unquestioned, as well as in consideration of the long silence of the present Plaintiff No. 1, and the silence, too, of his father while he lived, that a *Kharagpore* ghatwali is transferable if the zemindar assents and accepts the transference: and in the present case we think the Lower Court was justified in holding that the zemindar by making no objection within twelve years of the sale acquiesced in it, and that the transfer was therefore one which the Court ought to recognise. And looking to the fact that the purpose for which the *Kharagpore* ghatwalis were created, no longer exists, we should greatly regret being compelled to come to the contrary conclusion. We, accordingly, decide the first question in favour of the Defendants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure.

"And upon the second point, too, we think the Plaintiffs must fail. For only as ghatwals duly appointed by the zemindar could they establish any claim to possession of the tenure. And they nowhere allege that they have appointed ghatwals. Their case was that Plaintiff No. 1 had a vested interest by his birth in the ghatwali; but this we have shewn to be untenable.

"The result is, that we decree the appeal of the Defendants and dismiss the Plaintiffs' suit with costs of both Courts."

Cowie, Q.C., and *Cowell*, for the Appellants, contended that the decrees both of the High Court, and of the Subordinate Judge, so far as the latter was adverse, should be reversed and the prayer of the plaint decreed. The ghatwali tenure in suit was created by the Mahomedans, before the establishment of British rule in *India*, and was held, from the time of the permanent settlement, at a fixed jumma, subject to the duty of guarding the ghâts, or mountain passes. The original sunnud was not forthcoming, but the nature and incidents of the ghatwali tenures of *Kharagpore* were discussed in a judgment of the Privy Council (1) delivered by Lord *Kingsdown*, in the test case mehal *Dhamsain*, situate in the same zemindary, in which the Government of the day litigated their claim to resume these tenures, on the ground

(1) 6 Moore's Ind. Ap. 101.

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that ghatwali services were no longer necessary. This claim of the Government was dismissed, and the order of Her Majesty in Council to that effect was subsequently applied to the other mehals affected by a similar claim, amongst which was included mehal *Kharna*. Subsequently the zemindar endeavoured to resume the ghatwali tenures. His suit in respect of mehal *Kharna* was dismissed, and no settlement had ever been made between him and the ghatwal, who accordingly continued to hold under his ancient right. The test case, as between the zemindar and the ghatwals, was the suit relating to mehal *Kakwara*. The Privy Council (1), in that appeal, decided that the ghatwali lands were not granted as wages to hired servants, resumable if and when the services were dispensed with, but that the lands were held upon a grant at a fixed rent, subject to certain services, and as long as the holders of those grants were willing and able to perform the services, the tenures could not be determined, whether the services were required or not. The tenures in that case were held to be hereditary, coupling a usage to that effect with the terms of the original grant. This decision in reference to mehal *Kakwara* was applied by the High Court to the case of mehal *Kharna*, in the case of *Megraj Singh* v. *Rajah Lilanund Singh Bahadoor* (2), on the 29th of June, 1865. With regard to the law applicable to ghatwals and ghatwali tenure reference was made to *Hurlal Singh* v. *Jorawun Singh* (3): *Musst Teetoo Koonwaree* v. *Surwan Singh* (4); *Sartukchunder Dey* v. *Bhagut Bharutchunder Singh* (5); *Baboo Koolodeep Narain Singh* v. *Mahadeo Singh* (6); *Leelanund Singh Bahadoor* v. *Thakoor Munrunjun Singh* (7); *Rajah Nilmoni Singh* v. *Bukranath Singh* (8); *Chowdhry Chintamun Singh* v. *Nowlakho Konwari* (9); *Rajah Rup Singh* v. *Rani Baisni and Another* (10). It was contended that only the right, title, and interest of *Megraj Singh* in the ghatwali tenure was expressed by the sale certificate

(1) Law Rep. Ind. Ap. Sup. Vol. p. 181; affirming 3 Suth. W. R. 84.
(2) Unreported.
(3) 6 Sel. Rep. 169.
(4) S. D. A. (1853), p. 765.
(5) S. D. A. (1853), p. 900.
(6) 6 Suth. W. R. 199; affirmed in 11 Beng. L. R. 71; S. C. 14 Moore's Ind. Ap. Ca. 247.
(7) Ind. L. R. 3 Calc. 251.
(8) Law Rep. 9 Ind. Ap. 104.
(9) Law Rep. 2 Ind. Ap. 263.
(10) Law Rep. 11 Ind. Ap. 149; see also 20 Suth. W. R. 189.

and the execution proceedings to have been seized, sold, and passed to the purchaser, and that that right, title, and interest were limited to the exclusive right of proprietary possession during life. Whether Mitakshara law were referred to or the nature of the ghatwali tenure alone was considered, the father's interest was controlled by that of the son, and the transfer of his interest was inoperative to affect that of the son. On his death the interest of the purchasers ceased and the son succeeded by the family custom to that effect and in his turn held the tenure subject to readiness and willingness to perform services which were no longer required, as an impartible tenure, and alienable, with the consent of the zemindar, only so far as his own right, title, and interest extended. The zemindar could dismiss the ghatwal if the conditions were broken, and then he had a power of appointment. His consent, whether express or implied, did not operate to extend the ghatwal's power of alienation. Reference was made to *Simbhunath Panday* v. *Golab Singh* (1); *Kustoora Koomaree* v. *Binoderam Sein* (2).

Doyne, for the Respondents, was not called upon.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

The Appellant, *Tekait Kali Pershad Singh*, son of *Tekait Meghraj Singh*, deceased, instituted this suit on the 7th of April, 1881, against *Dhanraj Roy*, son of *Alam Roy*, deceased, and several others, to recover possession of the ghatwali mehal *Kharna*, comprising twenty-two mouzahs out of the mehals *Kharagpore*, which he alleged to be his ancestral ghatwali right.

The plaint, *inter alia*, alleged that the family of the Plaintiff was governed by the Mitakshara law, but subject to a family custom that the eldest son became the malik without dividing with the other brothers, who are entitled to maintenance only; that the *Tekait Meghraj* was in possession, and that Plaintiff No. 1, his eldest son, was born in Aughran, 1241, and thereupon acquired a right with his father in the mehal; that *Tekait*

(1) Law Rep. 14 Ind. Ap. 77, 81. (2) 4 Suth. W. R. (Misc.) 5.

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Meghraj, without the consent of the Plaintiff No. 1, who had then attained his majority, under the bond dated the 26th Cheyt, 1265, borrowed the sum of Rs.1300 from *Alam Roy*, ancestor of the Defendants Nos. 1, 2, and 3; that the aforesaid *Alam Roy*, on the basis of that bond, obtained a money decree against *Meghraj* without making the Plaintiff No. 1 a Defendant on the 18th of July, 1862; that on the sale in execution of that decree he got only the right and share of the said *Tekait* in the ghatwali mehal of mouzah *Kharna* sold by auction, and he purchased them himself at a reduced price, that is, for the sum of Rs.3525, on the 13th of July, 1868; that *Tekait Meghraj* died in the month of Bhadon, 1278 Fusli (that is August, 1871); that the Plaintiff, agreeably to the usage of the family, governed by the Mitakshara law, acquired the right of direct possession in respect of the whole of mehal *Kharna* aforesaid, since the death of the said *Tekait*. The Defendants, in their written statement, denying most of the allegations in the plaint, specially contended that the Plaintiff had not any joint estate with his father, who was the sole proprietor; that the restrictions on the Mitakshara law did not affect the estate or the sale in question, and that the particular nature of the ghatwali tenure which was based on actual service is contrary to the joint right of the sons according to the Mitakshara law. The Defendants further relied on their title under the execution sale, and as to the allegation of the Plaintiff that the property was sold for a trifling sum, they pointed out that it was sold subject to a zurpesghi lease, which is in effect a mortgage, for Rs.4923, which the purchasers had to redeem; that incumbrance had been created by *Meghraj*.

There were thirteen issues, but for the purposes of the present appeal it is only necessary to refer to one question, viz.: What did the Defendants purchase, and what right did they obtain in mehal *Kharna* as purchasers under the sale in execution of the decree?

The decision of the Subordinate Judge of *Bhagulpore* was given on the 13th of February, 1882. It occupies twenty-three large and closely-printed pages of the record. It exhibits great care and research, and is very full and very learned, but as it has been read at full length in the discussion at the Bar, it is

not necessary to observe upon its reasoning. The decision of the Subordinate Judge is: That the claim of the Plaintiffs in respect of two-thirds share of mehal *Kharna* be decreed; that the Plaintiffs do get possession of the aforesaid two-thirds share on payment of two-thirds of the amount covered by the previous mortgage, amounting to Rs.3282, and it is peculiar in this respect, that it is inconsistent with the case of the Plaintiff, and equally so with the defence. If the Plaintiff was entitled to relief on the case he has made, it was by a decree for the possession of the whole of the mehal *Kharna*.

Both parties were dissatisfied, and both parties appealed to the High Court. The decision of the High Court was given on the appeal of the Defendants on the 21st of April, 1884, and was, that the Plaintiffs' suit be dismissed with costs.

The High Court justly criticises the inconsistencies of the cases of both parties on the pleadings, and the peculiarity of the decision of the Subordinate Judge, and adds: "The tenure being undoubtedly a ghatwali, the Lower Court, we think, made a mistake in attempting to apply to the case the rules of the Mitakshara law." Their Lordships read this observation as confined to the Mitakshara rule by which a son when born takes a share equally with his father. The High Court then proceeds: "We concur with the counsel for the Appellants in his contention, that in dealing with a ghatwali, the Court must have regard to the nature of the tenure itself, and to the rules of law laid down in regard to such tenures, and not to any particular school of law, or to the customs of particular families. The incidents of a ghatwali tenure are the same whether the ghatwal be a Hindu or a Mussulman, or a follower of any other system of religion; and the same ghatwali might be held successively by persons governed as to other property by totally different rules of law. A ghatwali is created for a specific purpose, and has its own particular incidents." The High Court, continuing its reasons, adds: "The real and only material questions for us to decide are, first, whether the sale of this ghatwali in execution of a decree against the ghatwal was invalid and liable to be set aside by reason of the tenure being in its nature inalienable; and second, if the alienation was bad, are the present Plaintiffs

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entitled to recover the property? The second question also involves one of limitation." Their Lordships will deal with the first question alone.

The High Court, after considering the authorities which it deemed to be applicable, and pointing out the difference between the two classes of cases where the ghatwal is appointed by and holds directs under the Government and protected by Ordinances as in the *Birbhoom* cases, and where he is appointed by and holds under the zemindar who retained in his hands the power of appointing and the power of dismissing the ghatwal in case of non-performance of his duties, goes on to say: "We think we must hold upon the authority of the cases, and upon the evidence of many such transfers having been effected and unquestioned, as well as in consideration of the long silence of the present Plaintiff No. 1, and the silence, too, of his father while he lived, that a *Kharagpore* ghatwali is transferable if the zemindar assents and accepts the transference; and in the present case, we think the Lower Court was justified in holding that the zemindar in making no objection within twelve years of the sale, acquiesced in it, and that the transfer was therefore one which the Court ought to recognise. And, looking to the fact that the purpose for which the *Kharagpore* ghatwalis were created no longer exists, we should greatly regret being compelled to come to the contrary conclusion. We accordingly decide the first question in favour of the Defendants, Appellants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure." The Plaintiffs appeal against that decision.

Their Lordships are of opinion that the doctrines of the Mitakshara, which govern in some districts the Hindu law of inheritance, are not to their full extent applicable to a ghatwali tenure. By the general Hindu law of inheritance, where the Mitakshara does not prevail the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs, each son immediately on his birth takes a share equal to his father in the ancestral immoveable estate. Having regard to the origin and nature of ghatwali tenures and their purposes and incidents as established by decided cases, most of which

have been referred to in the course of the argument, it is admitted that such a tenure is in some particulars distinct from and cannot be governed by either the general objects of Hindu inheritance as above stated, or by the before-quoted rule of the Mitakshara.

It is admitted that a ghatwali estate is impartible, that is to say, not subject to partition; that the eldest son succeeds to the whole to the exclusion of his brothers. These are propositions that seem to exclude the application of the Mitakshara rule, that the sons on birth each take an equal estate with the father, and are entitled to partition. The allegation, too, that the estate is not in the whole or in part alienable, or, if alienable, is only so for the life of the alienor, must largely depend on local and family custom, and such custom, if proved to exist, may supersede the general law, though in other respects the general law may govern the relations of parties outside that custom. Thus the rules of the Mitakshara yield to a well-established custom, though only to the extent of that custom.

The question, then, which their Lordships have to consider and decide is whether the sale and transfer of a zemindary ghatwali in *Kharagpore* under a decree is invalid by reason of the tenure being in its nature inalienable?

The evidence establishes a number of instances in which there have been unquestioned transfers and sales applicable to mehals in *Kharagpore*, and some to portions of the same estate which the Plaintiff describes as part of his ancestral, inalienable, ghatwali right. This custom of alienation has been proved in fact by oral and documentary evidence to the satisfaction of the Subordinate Judge and of the High Court, and their Lordships see no reason to doubt the correctness of the conclusion in that respect of the two Courts.

It seems to their Lordships that the true view to take is that such a tenure in *Kharagpore* is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar.

The Plaintiff was of full age at the time of the sale. He does not appear to have made any objection to the sale or transfer, or

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to have taken any action during the period of twelve years that intervened between the sale and the institution of this suit, or during the period of ten years that elapsed between the death of *Meghraj* in 1871 and the 12th of April, 1881, when the suit was instituted. The zemindar made no objection, expressed no disapproval, was not asked to interfere, and did not interfere. It may reasonably be inferred that the zemindar and the officers of his zemindary were brought constantly into intercourse with the purchasers during their possession of twelve years after the sale, and could not have been in ignorance of the sale.

Their Lordships are of opinion that the Subordinate Court was justified in assuming under the circumstances the acquiescence of the zemindar in the sale and transfer under the decree, and that conclusion in fact has been approved and adopted by the High Court. Their Lordships do not deem it to be necessary to criticise the various decisions which have been brought so fully under their notice, and are of opinion that the High Court was correct in its conclusion that a *Kharagpore* ghatwali is transferable if the zemindar assents and accepts the transference.

There remains only to be noticed the argument that though the ghatwal might alien, it could only be for the life of the alienor. It seems to their Lordships that there is no foundation for this argument. When once it is established that the ghatwal had the power of alienation as before stated, that power forms an integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer. In this respect the present case so far differs from *Deendyal's* case and some other decisions of this Board that followed as to render them wholly inapplicable.

Their Lordships are of opinion that the judgment of the High Court should be affirmed and this appeal dismissed, and will so humbly advise Her Majesty. The Appellant must pay to the Respondents the costs of this appeal.

Solicitors for Appellants: *Barrow & Rogers.*
Solicitors for Respondents: *T. L. Wilson & Co.*

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GANGA PERSHAD . . . . . PLAINTIFF. *Dec.* 13, 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Benamee—Alleged Benameedars held to be beneficially entitled—Conduct and Representations of Plaintiff.

Case in which it was held that certain properties which had been partly purchased in the wife's name, and partly transferred to her name by her husband, belonged beneficially to the wife, and were not benamee for the husband; and in which the prior conduct and representations of the Plaintiff, inconsistent with the allegations in the plaint that the transactions were benamee for the husband, were *held* to defeat his claim.

APPEAL from a decree of the High Court of the *North-Western Provinces* (Jan. 23, 1883), reversing a decree of the Subordinate Judge of *Aligarh* (July 15, 1880), which had dismissed the Respondent's suit with costs.

The question in the appeal was as to the effect of a certain deed of gift dated the 6th of May, 1878, whereby the first Defendant, *Musammat Thakro*, purported to transfer to her daughters the other Defendants, mouzah *Shahpur Thatvi*, the property in suit. Possession followed the deed, and the suit, which was brought by the Respondent, *Thakro*, the son of *Musammat*, on the 3rd of May, 1879, was to avoid the deed and obtain possession of the mouzah.

The allegations of the plaint were that *Ganesh Singh*, the deceased husband of *Thakro*, and father of the other parties to the suit, had acquired the whole of the said mouzah by mortgage and private and public purchase, partly in his own name and partly in that of *Thakro*, and subsequently in 1862-3 caused *Thakro's* name to be recorded in respect of the entire property; that the mouzah remained in *Ganesh's* possession, and after his death was under the management of the Plaintiff; and that on the 6th of May, 1878, *Thakro* executed a false deed of gift thereof in favour of her two daughters, describing the mouzah as her acquired property and stridhana.

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The allegation of the Defendants' written statement with regard to the original acquisition of the property was that *Ganesh Singh* "had given away his entire share in the disputed village to his wife *Thakro* before the birth of the Plaintiff, and put her in proprietary possession. The *Musammat* herself purchased the remainder, and thus under these two different titles she has been in possession of the entire village as proprietor for more than twelve years."

The finding of the Subordinate Judge was as follows:—

"A careful consideration of all the oral and documentary evidence, and presumptions and probabilities, clearly leads the Court to infer that the whole of the village in dispute is the property of *Musammat Thakro*, and is not the estate left by *Ganesh Singh*, and that up to the date of the deed of gift in question it remained in her possession."

The High Court reversed this judgment and held "that the Plaintiff has made good his appeal on the ground that the record of his mother's name was of the common place ism-i-farzi character, that she consequently and in fact never had any possession of the property in any way adverse to *Ganesh Singh*, its owner, or to the Plaintiff, who with his half brother *Dip Chand* is his heir."

The High Court thereupon decreed that the Plaintiff should recover possession of the whole of the property in which he was only declared to be entitled to a half-share, the right of the donees being declared null and void, and it being further declared that the decree should not affect the rights and interests of the minor son *Dip Chand* to his father's estate of *Shahpur Thatvi*.

Graham, Q.C., and *Cowell*, for the Appellants.

Mayne, and *J. G. Witt*, for the Respondent.

The cases cited were *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (1); *Uman Pershad* v. *Gandharp Sing* (2); *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty* (3).

(1) 13 Moore's Ind. Ap. Ca. 395. (2) Law Rep. 14 Ind. Ap. 127.
(3) 11 Moore's Ind. Ap. Ca. 28.

1887. Dec. 14. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal by *Musammat Thakro* and other ladies against *Ganga Parshad*, the Respondent. The appeal is from a decree of the High Court of the *North-Western Provinces* at *Allahabad*. The suit was brought by *Ganga Parshad* against *Musammat Thakro*, his mother, and the other ladies, who were the daughters of *Musammat Thakro*, in whose favour the mother had executed a deed of conveyance, the Plaintiff alleged that his father, *Ganesh Singh*, "had a large property; that he, on different occasions, by mortgage and private and public purchase, having obtained mouzah *Shapur Thatvi* in his own name, as well as in the name of *Musammat Thakro*, Plaintiff's mother, himself remained in possession thereof. Subsequently, in 1862 and 1863, the name of the said *Musammat* was recorded in respect of the entire property in the said mouzah, though the said *Ganesh Singh* continued in possession of it." He then alleged that on the 12th of October, 1872, *Ganesh Singh* executed a will, and "on the 17th of October, 1872, died, and that *Musammat Thakro*, Plaintiff's mother, continued to live with him (Plaintiff), and the village in dispute, like other paternal estates, remained under the management of the Plaintiff." Then he proceeded as follows: "On the 6th of May, 1878, the said *Musammat Thakro* executed a false deed of gift"—by which he meant a deed of gift which she had not the power to execute—"of the said mouzah in favour of her two daughters, *Musammat Radha* and *Bhawani*, describing the said mouzah to be her acquired property and stridhan, and thus effected the Plaintiff's dispossession ever since the *Musammat* began to live separate, which is the time when the cause of action arose. The village in dispute being the acquired property of the Plaintiff's father, who had simply on account of affection caused the name of *Musammat Thakro* to be entered, the latter was not, under the Hindu law, competent to transfer the property to her daughters. The Plaintiff is, in every way, entitled to get the property. The Plaintiff therefore seeks for the following reliefs: (1) That the Plaintiff's right may be declared in respect of the disputed property, and the deed of gift executed on the 6th of May, 1878, by *Musammat*

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Thakro, Defendant, in favour of *Musammats Bhawani* and *Radha*, be declared invalid, void, and inoperative as far as the Plaintiff's right is concerned. (2) That both the last-mentioned Defendants may be dispossessed of the disputed mouzah, and their right as donees declared null and void."

A written statement was put in on behalf of the ladies, and the case being tried by the Subordinate Judge, he raised several issues, the principal one of which was the fourth, "Whether *Shapur*, the village in dispute, is wholly or partly the personal property of *Ganesh Singh*; and he alone remained in possession as long as he lived, and since his death, the Plaintiff remained in possession thereof till the date of the accrual of the cause of action, and is therefore entitled to possession thereof; or the village in question is wholly or partly the personal property of *Mussammat Thakro*, the widow of *Ganesh Singh*, deceased, who has been in possession thereof for more than twelve years, and the Defendants are in possession from the date of gift, and the Plaintiff's claim is therefore barred by lapse of time and he has no right in the property in dispute." Upon that the Subordinate Judge says:—"Just as the Defendants have not proved their assertion, so the Plaintiff also has not proved that *Ganesh Singh* fictitiously transferred that amount of land of the village of *Shahpur Thator* which was in his name to *Musammat Thakro*." The question really was, whether, when the mutation of names was made from the name of *Ganesh* into the name of his wife, it was his intention to transfer the property into the name of his wife benamee for him. The Subordinate Judge upon this point says:—In short, a careful consideration of all the oral and documentary evidence and presumptions and probabilities clearly leads the Court to infer that the whole of the village in dispute is the property of *Musammat Thakro*, and is not the estate left by *Ganesh Singh*, and that up to the date of the deed of gift in question it remained in her possession." The Subordinate Judge therefore found in substance that the mutation of names in 1862 was not for the purpose of putting the property into the name of the wife benamee for the husband, but for her own benefit.

Upon appeal to the High Court that Court came to a different conclusion. They held that the property was put by the husband

into the name of the wife to hold it benamee for him, and that consequently the property remained the property of the husband, and that the wife had no power to assign it to her two daughters, although it stood in her name.

A considerable part of this property, as shewn by the Subordinate Judge in his judgment, was purchased in the name of *Ganesh*, the husband, and certain other parts in the name of the wife. The wife gave evidence that that portion of the property which was purchased in her name was purchased for her benefit and with her own money. It is unnecessary to decide whether the part of the property which was purchased in the name of the wife was purchased with her money or with that of her husband, because even if the property which was purchased in the name of the wife was the property of the husband, as well as that which was purchased in his own name, the question still remains whether when the husband allowed the mutation of names from his name into the name of his wife, he intended that mutation to operate for his own benefit or for hers.

The wife in her evidence in the cause stated that in the year 1847, when the husband was about to marry a second wife, that portion of the property which had been purchased in the name of the husband was made over to her in consideration of his being about to marry a second wife, and that afterwards the other portions of the property were bought in her name, so as to make the whole her property.

In the Mitakshara, sect. 11, clause 1, speaking of the nature of stridhan, it is thus stated: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so, the property so presented becomes her stridhan according to the doctrine above laid down. The wife says, that in the year 1847, when the husband was about to marry a second wife, he did make her a present of the property which had been purchased in his own name. Although the High Court has found that there was no actual proof of that

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fact, it is not improbable that the husband, when about to marry a second wife, should have stated to his first wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife. The statement of the wife is corroborated by the fact that in the year 1862 he caused the property to be changed from his own name into that of his wife. On the 4th of March, 1862, he says: "In partnership with my wife, *Musammat Thakro*, I am the lambardar and a shareholder of mouzah *Shahpur Bhatai*, pergunnah *Gori*. Now of my own free will, I pray that my name as sharer in the said mouzah be expunged, and that of the said *Musammat* alone be entered as proprietor of both the shares, as the village administration paper is being written now. I have no longer any claim." If when he was about to marry the second wife he told his first wife that he would make her a present of the property and did not carry out the gift by an actual deed, and in 1862 caused a mutation of names declaring that he had then no longer any claim to the property, that would not shew that he was causing the mutation in order that the wife might hold it benamee for him. There was a complete mutation of names from the husband of all that he possessed in the village of *Shahpur* into the name of the wife. The subsequent purchases were made in the name of the wife. If he intended the subsequent purchases, though made with his own money, to be made in the name of his wife, the probability is that he intended the whole of *Shahpur* to be vested in her as her stridhan. The Plaintiff claims it as his own property. It is to be remarked that by the second wife his father had another son, *Dip Chand*. If the property had been transferred in 1862 into the name of *Thakro*, benamee for the father, it would have remained the father's property, and being the father's property would have descended to his two sons. But the Plaintiff does not claim it as being the property of the two sons. He claims it as his own property, and as having been put into his mother's name in order that he might become entitled to the benefit of it; not that it was put into his mother's name in order that it might be held by the mother benamee for the benefit of the father.

Several documents were put in. There is a copy of a petition "by *Ganga Parshad* against *Musammat Thakro*, his mother, and *Musummats Radha* and *Bhawani*, his sisters." That was dated in 1878, after the mother had executed the conveyance in favour of her daughters. In paragraph 3 he says:—"The Appellant's father caused the name of *Musammat Thakro*, mother of the Appellant, to be entered in respect of the property through some policy. The name of the Appellant's mother was entered simply with a view that the children born of the other wife of the Appellant's father might not get a share in this property, and that the Appellant alone might get it." The father, when he made this transfer of *Shahpur* into the name of the mother, did not appear to have had any creditors or any particular reason for putting this portion of his property into the name of the mother instead of allowing it to remain in his own name, unless it was for the purpose of giving the mother a benefit. If he had intended to put the property into the hands of the mother in order to conceal it from his creditors, and to make it appear that it was his wife's property instead of his own, the probability is that he would have done the same with regard to his other property, and not only in respect of this particular village.

The representation on the part of the Plaintiff shews that whatever the object of his father in making the mutation was, it was not to put the property into the hands of the mother to hold it benamee for the father. If he had put it into her hands with that object the two sons would have become entitled to it, but the case of the Plaintiff is that the object of the father in putting it into the name of the mother was that the issue of the second wife should have no share in it.

Further, a petition of guardianship was put in evidence. It was an application by *Ganga Parshad*, the Plaintiff. He there says: "My father, *Ganesh Singh*, died in October, 1872, leaving two sons, *i.e.*, myself and *Dip Chand*, a minor"—that is the son of the second wife—"who is now 2½ years old, as his heirs, and we two sons of the deceased are owners in equal shares of the property left by him." If the property remained the father's, *Shahpur*, as well as all the other properties, would have been the joint property of the two sons, *Dip Chand* and himself, but in a

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schedule to the petition particularising the property which his father left, he excluded *Shahpur*. That was either a gross fraud upon his brother, whose guardian and trustee he then was, with the intention of causing it to be believed that *Shahpur*, which was held as he alleged by his mother for the benefit of his father, was not the property of his father, or he must have believed at the time that the property was put into the hands of the mother, not benamee for the father, but for some other purpose. He afterwards filed a list of the property left by his father, in which *Shahpur* is excluded, which shews that there was no mistake in the omission of *Shahpur*. In both those documents *Shahpur* is excluded as property left by the father, which if left by the father would have belonged to himself and his brother. In his evidence, he says: "I know and consider *Shahpur Bhatai* to be my own share and not of *Dip Chand*." In the face of these statements he cannot now contend that the property was held by his mother benamee for his father. He contended at one time that the property was put into his mother's name benamee for himself. If that were so it was for him to prove the fact, which he was unable to do.

Looking at the conduct of the Plaintiff and at the representations which he made, which would have been grossly fraudulent if the property had been in the mother's name benamee for the father, their Lordships have come to the conclusion that the case of the Plaintiff is not made out, viz., that the property was put into the hands of the mother benamee for the father. Their Lordships do not believe that it was put into the hands of the mother for the purpose of giving the Plaintiff the sole interest in the property, or that it was put into the hands of the mother benamee for the father.

Under these circumstances their Lordships think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the Plaintiff, that the property was the property of *Thakro* and not the property of the Plaintiff. The Plaintiff even in his plaint does not state that the property was that of himself and *Dip Chand*, but claimed it as his own property. *Dip Chand* was

no party to the suit, as he ought to have been if the property was that of the father.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed and the decree of the Subordinate Judge affirmed, and that the Respondent be ordered to pay the costs of the appeal to the High Court. The Respondent must also pay the costs of this appeal.

Solicitors for Appellants: *Ford, Ranken Ford, & Ford.*
Solicitors for Respondent: *Pritchard & Sons.*

RAIKISHORI DASI AND ANOTHER . . . DEFENDANTS;

AND

DEBENDRANATH SIRCAR AND OTHERS . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Construction of a Will—Illegal Restrictions, where separable from Valid Dispositions, do not invalidate a Will—Separable Provisions as to Gift over.

Case in which it was held by the High Court, without dissent by their Lordships, that by the true construction of three wills there was a valid gift of the testator's property in equal shares to his six sons; that restrictions imposed by the second and third wills upon the proprietary interest conferred by the first will, that is, upon the right of possession, alienation, and partition, were illegal and inoperative; and that such provisions as tended to create a perpetuity were invalid.

Where a testator directed that the share of a son dying should go to the surviving sons, but also directed that for the purposes of the gift over the sons of a predeceased son or sons should stand in the place of their fathers:—

Held, that these are two separable provisions, and that in regard to the share of a son dying, where there are no sons of a predeceased brother in existence, there is a valid gift over to the survivors, whether or not the second provision would have been void as being a gift to an indefinite class.

APPEAL from a decree of the High Court (Sept. 9, 1884) reversing a decree of the Subordinate Judge of *Pubna* (Sept. 30, 1882).

The suit was brought by the Respondents against the Appel-

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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lants for a declaration that under certain wills of one *Biswánath Sircar* deceased, the first Appellant took no interest in the property of her late husband, and that an assignment by her to the second Appellant was invalid. The original Court dismissed the suit, being of opinion that the alleged wills were not genuine, and, if genuine, were invalid. This decree was reversed by the High Court, which pronounced the wills to be genuine, and, though invalid in part, to be effectual to the extent of disinheriting the first Appellant.

On the 21st of January, 1856, *Biswanath* made the first of his three wills, the only important part of which is the following passage:—

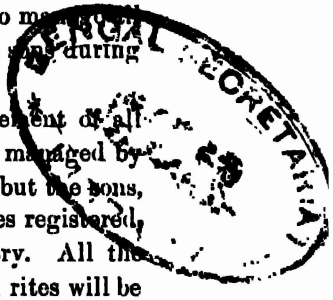
"On my death the adopted son *Gobind Nath Sircar* shall get a share of 3 annas, *Brojendra Nath Sircar*, a share of 5 annas, *Krishnendra Nath Sircar*, a share of 4 annas, and *Jagadindra Nath Sircar* shall get a share of 4 annas of all those properties, and of the properties which I may acquire in future. Again, if I get a son, then *Gobind Nath Sircar* shall get a share of 2 annas, 10 gundahs, *Brojendra Nath Sircar* a share of 3 annas 15 gundahs, *Krishnendra Nath Sircar* a share of 3 annas 5 gundahs, *Jagadindra Nath Sircar* a share of 3 annas 5 gundahs, and that son shall get a share of 3 annas 5 gundahs. If besides one son I get more sons hereafter, then, with the exception of the dalan which I have demarcated and given in the share of *Brojendra Nath Sircar*, minor, as stated below, the adopted son and sons born of my loins, *i.e.*, all the sons, shall be entitled in equal shares to all my properties, movable and immovable, and no one will be able to raise any objection thereto. If there be no sons born, then the division will be according to the above shares."

A little more than six years afterwards, *Biswanath* made a second will, dated the 23rd Bysack, 1269 (1862). The material parts of it are contained in the following passages:

"My reversionary heirs may, after my death, raise disputes among themselves with regard to the determination of their shares in all my properties, movable and immovable, and thus destroy those movable and immovable properties. I, therefore, before this, made a settlement by will, on the 9th Magh, 1262, and those matters which have not been settled therein are again

amended; and by making this will I represent the same in the following paragraphs. All affairs are to be regularly managed according to the former will above-mentioned, and this will, and none of the reversionary heirs will be able to raise any objection thereto."

"1. Until my youngest son attains majority, the sons who have attained majority shall not be able to get their names registered and interfere with the properties, movable and immovable. When the said minor son attains majority, the names of all will be registered together, and the son of my spiritual guide has been appointed executor under the former will, in order to manage the affairs and take care of them on behalf of all the sons during all this time."



"I have fixed a common cutchery for the management of all public and family affairs. All the affairs shall be managed by the joint amlas and managers, *i.e.*, of the 16 annas, but the sons, even on attaining majority, and getting their names registered, shall not be able to break down the common cutchery. All the expenses for the performance of daily and periodical rites will be defrayed under the management of the amlas of the 16 annas, and the sons shall get the remaining amount of profit in accordance to their respective shares from generation to generation. Besides this, they shall not be able to break down the common cutchery and bring the same into their own possession. If any of the amlas of the 16 annas be guilty in any way, then the sons who may have attained majority, and the managers, shall dismiss that amla, and appoint another amla in his place, and they shall also get the affairs managed if they can be managed even by dismissal of one of the amlas who are employed. But they shall never be able to destroy the ijmali (joint) character of the thing."

About eight years afterwards, *Biswanath* made the last of the three wills, dated the 9th Srabun, 1277 (1870). It commenced by reciting that since the date of the first will "two other sons have been born, one after another, and their names are *Jogendro Nath* and *Digindra Nath*. Now I have six sons living and according to the arrangement made in the former wills the shares of all would be equal." In paragraph 3, after setting out certain charges upon the income of his property the testator

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proceeded, "all my sons shall get the profits which shall be left over and above that according to the shares mentioned above. And they will not be able to be personally in possession according to the shares specified in this, and they shall not be able to make gift and sale or any other kind of alienation of their respective shares aforesaid." The remaining material portions of the will are as follows:—

"5. My heirs shall enjoy the profits of my zemindari and other immovable properties according to the prescribed rules. If, God forbid, any of those sons die without sons, then none of his heirs shall get his share; but my heirs my remaining sons, or if they have sons then those sons shall get it according to those shares. If any of these sons of mine becomes indebted then that debt shall be realized from him, and these zemindaries &c. of mine shall not either be sold by auction or be liable for his debt, because it is only for the purpose of carrying on their maintenance that I have fixed the share of the right of each of my sons, and besides this, they shall have no proprietary right or ownership whatever in those shares. As regards the rules which have been laid down for the sons who are to enjoy the profits of my properties, movable and immovable, if any do not get sons, but only daughters, then the sons born of the wombs of those daughters shall not be able to be heirs to and claimants of my movable and immovable properties on the ground of the same being the properties of their maternal grandfather."

"6. If, God forbid, any of the sons do not get any son or daughter, or if any son dies without getting sons, then his widow shall got for life only a fair amount for her maintenance, and the expenses for broto and other pious acts from the profits of her husband's share, but she shall not be entitled to the profits of the entire share, or be competent to make sale and gift of anything on the ground that it was the property left by her husband."

"11. The money in cash which I have shall remain in the custody of my wife *Brahmamoyi Dasi*, and the adopted son, *i.e.*, the eldest son *Gobind Nath Sircar*, and no one shall be able to divide it. New zemindaries can be purchased from it, and in case of deficiency in the sudder rent, it can be paid at times from it, but it will be afterwards recovered by realization of the

outstanding balances. In case of marriage &c. the expenses thereof can be paid therefrom, but the amount is to be afterwards recovered by realization of outstanding balance due or from the profits. With the exception of these it will not be spent for extra family expenses."

As regards the construction of these wills (supposing them to be genuine) the Subordinate Judge ruled as follows:—

"According to the fair construction of these wills I find that the *corpus* of the property has not been given by the testator to his sons, and that the said testator excluded his female heiress without reasonable cause from inheritance, and he kept his property in abeyance. I therefore hold that such gift is not absolute, and it is null and void according to the Hindu law, and that the principles of Hindu law must apply in this succession because the disputed property cannot be kept in abeyance or suspense without an owner."

The following are the material passages in the judgment of the High Court (Tottenham and Field, JJ.).

As regards the legal effect of the three wills, the Judges of the High Court pronounced their opinion as follows:—As regards the 1st will, they said—

"Now in this passage which has just been set out (see passage from the first will above cited) it appears to us that there was an absolute gift by the testator of his property movable and immovable to his sons in the shares therein specified. The second paragraph of the will proceeds to provide for payment of debts, which are to be satisfied by the sons in the shares according to which they were to receive the property. The third paragraph appoints executors and managers of the property during the minority of some of the sons, and directs that when the minor sons shall attain majority they, and the adopted son, shall receive the movable properties as per list aforesaid from the guardian and executors according to the shares already set out in the will. The fourth paragraph contains directions as to the apportionment of the family dwelling-house. The fifth paragraph contains similar directions as to certain appurtenances of the family dwelling-house. The sixth paragraph provides for defraying the expenses of the religious ceremonies and rites, and the

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seventh paragraph reserves to the testator the right to alter that will if he saw fit so to do. Now there can be no doubt that if the devolution of the testator's property depended upon this instrument alone, it would be necessary to decide that all the sons took equal shares of the whole of the property, movable and immovable."

As to clauses 2 and 3 of the second will they said:—"In our opinion this is a restriction upon partition, the right to which, according to the law administered in these provinces, must be regarded as an essential element of ownership. We think, therefore, that the restriction is void, and that the gift of the property in the shares specified in the first will cannot be affected thereby. The third clause provides for the defrayal of the expenses of the marriages of members of the family from joint funds, and directs that until the youngest son attains majority none of the sons shall be able to separate; and if they do so, then any son who separates is to get merely maintenance, and is not to be entitled to the profits accruing upon his share up to the time when he attains majority. This is, we think, a valid clause, and can be enforced if occasion should arise. The remaining provisions of this will do not require further notice or comment upon the present occasion."

As regards the important clauses 3, 5 and 11 of the third will, the High Court made the following remarks:

"The will then provides as follows:—'All my sons shall get the profits which will be left over and above that according to the shares mentioned above, and they will not be able to be personally in possession according to the shares specified in this, and they shall not be able to make gift and sale and any other kind of alienations of their respective shares aforesaid.' After other provisions with which we are not at present concerned, the will thus proceeds in paragraph 5:—'My heirs shall enjoy the profits of my zemindari and other immovable properties according to the prescribed rules. If, God forbid, any of those sons die without sons then none of his heirs shall get his share, but the rest of my sons and heirs, or if they have sons, then those sons shall get it according to those shares. If any of these sons of mine become indebted, then that debt shall be realized from him, and these

zemindaries, &c., of mine shall not either be sold by auction or be liable for his debt, because it is only for the purpose of carrying on their maintenance that I fix the share of the right of each of my sons, and besides this, they shall have no proprietary right or ownership whatever in those shares. As regards the rules which have been laid down for the sons who are to enjoy the profits of my properties movable and immovable, if any son do not get sons, but only daughters, then the sons born of the womb of those daughters shall not be able to be heirs to, and claimants of my movable and immovable properties on the ground of the same being the properties of their maternal grandfather.' Now what we have to consider is whether the above provisions, viz., that the sons shall get the shares of the profits and shall not be able to be personally in possession and shall not be able to make any gift or sale or any other kind of alienation, and the further declaration in the fifth paragraph that it is only for the purpose of carrying on their maintenance that the testator had fixed the share of the right of each of his sons, and besides this that they have no proprietary right or ownership whatever in those shares, have so far altered or modified the disposition of the property contained in the first will of the 9th Magh, 1262, as to amount to a revocation of the absolute bequest contained in that first will. Upon the best consideration that we have been able to give to the arguments that have been addressed to us we are of opinion that they do not. We think that the first provision as to the sons receiving the profits and not being able to get possession of their shares (we may observe that the passage containing this provision has not been quite accurately translated in the paper book) embodies a restriction which must be held to be invalid and inoperative. The true meaning of the original passage in the will is that the sons shall not get possession of designated or specified shares, in other words that there shall be no partition, and this is merely a repetition of the previous condition in paragraph 2 of the second will. Then the restriction upon alienation is also invalid, being opposed to the policy of the law. The passage in paragraph 5 taken with the context clearly has for its object the prevention of the property from being made liable for debts incurred by the sons, and this object is one which cannot be

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effectuated. The conclusion then at which we arrive upon the construction of these three testamentary instruments is that there was a good gift to the six sons of the testator's property in equal shares; and that in the second and third wills the testator has endeavoured to impose restrictions upon the proprietary interest conferred by the first will, which restrictions are opposed to law, and must therefore be regarded as invalid and inoperative."

"The next question with which we have to deal arises upon the construction of the 5th paragraph of the third will, dated the 9th Srabun, 1277, which provides as follows":—

'If any of those sons die without sons, then none of his heirs shall get his share, but the rest of *my sons and heirs*, or if they have sons then those sons shall get it according to those shares.' We may observe that here also there is an error in translation: "The rest of *my sons and heirs*," is an erroneous rendering of the original. "The rest of my sons *being heirs* or *who are* heirs" is the proper meaning. It has been contended by the learned counsel, Mr. *Evans*, that the gift over created by these words is bad, inasmuch as it is a gift to an indefinite class. In support of this contention we have been referred to the case of *Sowdamini Dasi* v. *Jogesh Chunder Dutt* (1), and we have been asked to apply the principle laid down in that case to the case which is now before us. We may observe that in the case of *Rai Bishen Chand* v. *Mussummat Asmaida Koer* (2), the principle of English law which was adopted and made applicable to Hindus in the case of *Sowdamini Dasi*, was considered and observed upon by their Lordships of the Privy Council. The case of *Rai Bishen Chand*, was no doubt, a case not of a will but of a deed *inter vivos* intended to have immediate operation, and as regards the applicability of the principle to Hindu wills, their Lordships decided nothing definitely. They did, however, refer to illustration (*b*) sect. 102 of the Succession Act (X. of 1865), as importing into *India* an English rule of construction which usually defeats the intention of the testator, and it would appear that the adoption of the English rule of construction did not recommend itself to their Lordships on that occasion as a sound principle applicable

(1) Ind. L. R. 2 Calc. 262. (2) Law Rep. 11 Ind. Ap. 164.

to the wills of Hindus. If we had to decide whether this principle ought to be adopted in this country, we should perhaps think it necessary to refer the question to a full Bench, having regard to the recent observations of the Privy Council in the case just referred to, and because we ourselves entertain some doubt as to whether this principle ought to be followed in construing the wills of Hindus. We think, however, that it is not necessary to decide this question on the present occasion. We have not here to deal with an intention to which, in its entirety, it is impossible to give effect, and in consequence of its being impossible to effectuate the whole intention, any attempt to give effect to a portion of it would practically amount to making a new will for the testator by substituting another and a different intention, the existence of which is not to be gathered from the will. We think that in the present case there are two intentions wholly separable, the second not depending upon the first, and that it is possible to give effect to the first intention without entering into the question whether the second intention is one to which the law can or cannot allow effect. The will provides that if one of the sons die without sons, none of his heirs shall get his share; but, first, that the rest of the testator's sons shall get that share; and second, that if any of those other sons have died having sons, the sons so left shall receive the share, that is; their proportion of the share, or, in other words, as we understand it, that the sons of the deceased sons shall, for the purposes of the inheritance, stand in the place of their fathers. Now, assuming for argument's sake that the sons of the deceased son constitute a class, some of whom may have been in existence at the time of the testator's death, while others may have been born subsequently, that this class therefore consists of some who may take, and others who cannot take, and that the gift over to these sons of a son is in consequence invalid, we have to observe that this second case has not yet arisen. The case with which we have to deal is the case of one of the testator's sons dying and other sons surviving him. We may observe that as *Jagadindra Nath* died before *Gobind's* death, and without male offspring, it is unnecessary to consider him in dealing with the question before us. Now it appears to us that the first intention,

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that is, the intention that if one of the testator's sons shall die, the other surviving sons shall receive his share is an intention complete in itself and one to which we can give effect, and that the validity of the gift over in this case is not affected by the further provision as to what is to be done if one of the sons predecease the son in respect of whose share the question arises, such son so predeceasing having left sons in respect of whose right the question of the validity of the second intention would have to be considered. This case has not arisen, and it is therefore unnecessary for us to decide whether the gift would, in this case, be void as a gift to an indefinite class. We are therefore of opinion that we ought to give effect to the clear intention of the testator as to the share of a son dying going over to the other sons who survive him. We think, then, that according to the true construction of the will, upon the death of *Gobind Nath Sircar* the one-sixth share which he originally received under the provisions of the will together with the share which he obtained upon the death of *Jagadindra Nath Sircar* went over under the provisions of paragraph 5 of the third will to the four sons who are Plaintiffs in this case, and that *Raikishori Dasi*, the widow, was not entitled to take anything by inheritance from her deceased husband, *Gobind Nath Sircar*.

"It has further been contended by the learned counsel for the Respondent that the provisions contained in paragraph 11 of the third will of the 9th Srabun, 1277, are wholly void, and that in respect of the movable and other properties specified in this paragraph there is an intestacy, and that in consequence *Raikishori Dasi* is entitled to the share in such property which her husband would have received according to Hindu law. We are of opinion that there has been in this paragraph of the will an attempt to tie up the property in perpetuity, that this attempt must fail, and that no effect can be given to these provisions of the will. But we do not think that the result will be that there is an intestacy in respect of these portions of the property. We think, as we have already said, that there has been a good gift of the whole of the property in paragraph 1 of the will of the 9th Magh, 1262, and that the attempt to tie up the property failing, the original gift must prevail."

Mayne, for the Appellants, contended that the decree of the High Court should be reversed. Upon the question of the construction and the true effect of the three wills, he contended that the provisions in the second and third wills, which governed the estates to be held by the sons of the testator, were inconsistent with, and amounted to a revocation of the estates conferred upon them by the first will. The first and second wills must be read together, and the third will must be taken as expressing the final and complete intention of the testator. It is substituted for the others. The result is, there is an intestacy, whether the third will is valid or invalid. The only estates intended to be conferred on his sons by the testator in the third will were illegal and void, for he did not intend them to take except subject to illegal restrictions; so also were the provisions intended by the testator to take effect, in case any son died sonless. The disposition, moreover, intended to be made by the testator in clause 11 of the third will was illegal and void. Reference was made to *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi* (1). Certain illegal restrictions are imposed, which shew that the testator intended to keep the estate floating, as it were, *in nubibus*. He did not intend his sons to have it without the restrictions. As regards any attempt to spell out a meaning that is legal from provisions which on the face of them are illegal, see the *Tagore Case* (2). The whole scheme fails and intestacy resulted. Reference was made to *Leake* v. *Robinson* (3); *Pearks* v. *Moseley* (4); *Bramamayi Dasi* v. *Jageschandra Datt* (5); *Rai Bischen Chand* v. *Mussummat Asmaida Koer* (6).

Doyne, and *C. W. Arathoon*, for the Respondents, contended that the judgment and construction of the High Court were right. With regard to the share to which the Appellant was entitled supposing intestacy to have resulted, reference was made to *Soorjemony Dossee* v. *Dinobundhoo Mullick* (7). With regard to the effect of the will no question arose as to any unborn donee,

(1) Law Rep. 12 Ind. Ap. 103; on appeal from Ind. L. R. 7 Calc. 269.
(2) 4 Beng. L. R. p. 103; 9 Beng. L. R. 406; S. C. Law Rep. Supp. Vol. Ind. Ap. 47.
(3) 2 Mer. 363.
(4) 5 App. Cas. 714.
(5) 8 Beng. L. R. 400.
(6) Law Rep. 11 Ind. Ap. 164.
(7) 6 Moore's Ind. Ap. Ca. 526; 9 Moore's Ind. Ap. Ca. 123.

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and a gift over to a person in existence is permitted. Here no question arose as to any sons of a predeceased son, for none were in existence; and therefore at the time of the institution of the suit the will was good, and can be carried out in the events which have happened. [SIR BARNES PEACOCK:—But he intended that even the son should not alienate.] There is an absolute gift to the sons. [SIR BARNES PEACOCK:—Until the youngest son comes of age, they are not to separate, even in food.] Illegal restrictions can be disregarded as inoperative. The High Court is right that there is no operative gift to a class; even if there had been, in the events which have happened it does not purport to take effect.

Reference was made to *Sonatun Bysack* v. *Juggutsoonderee Dossee* (1); *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (2); *Ramlal Mookerjee* v. *Secretary of State for India in Council* (3); *Sowdaminey Dossee* v. *Jogesh Chunder Dutt* (4); *Bramamayi Dossee* v. *Jogeshchandra Dutt* (5); *Kherodemony Dossee* v. *Doorgamony Dossee* (6); *Leake* v. *Robinson* (7); *Pearks* v. *Moseley* (8); *Callynath Naugh Chowdry* v. *Chundernath Naugh Chowdry* (9); *The Tagore Case* (10).

Mayne, replied.

1887 Dec. 15.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Respondents in this appeal were the Plaintiffs in the action. They were four of the sons of *Biswanath Sircar*. The first Defendant, *Raikishori Dasi*, was the widow of the late *Gobind Nath Sircar*, who was an adopted son of *Biswanath*. The Plaintiffs claim to be entitled under the will of their father to succeed, upon the death of *Gobind Nath* without male issue, to the share of the father's property to which he had succeeded on his father's

(1) 8 Moore's Ind. Ap. Ca. 66.
(2) Law Rep. 5 Ind. Ap. 138.
(3) Law Rep. 8 Ind. Ap. 46; S. C. Ind. L. R. 7 Calc. 304.
(4) Ind. L. R. 2 Calc. 262.
(5) 8 Beng. L. R. 400.
(6) Ind. L. R. 4 Calc. 455.
(7) 2 Mer. 363.
(8) 5 App. Cas. 714.
(9) Ind. L. R. 8 Calc. 378
(10) 3 Beng. L. R. 103; 9 Beng. L. R. 406; Law Rep. Supp. Vol. Ind. App. 47.

death. The widow contended that the will of the father was illegal and void, and, consequently, that upon the death of her husband, *Gobind Nath*, she as his widow succeeded to his share of the property, and acting upon that view she, by deed dated the 9th of Falgoun, 1285, transferred a portion of the property to the Defendant No. 2 (*Syed Abdul Sobhan Chowdhry*). The Plaintiffs by their plaint prayed that after putting a true construction on the will of the late *Biswanath Sircar*, the Court would be pleased to pass a decree declaring that Defendant No. 1, that is to say, the widow of *Gobind Nath*, had no right to the property stated in the schedule marked (*ka*), and to declare the Plaintiffs' right to the said property in accordance with the said will. They also prayed that after declaration of the Plaintiffs' right, the Court would be pleased to pass a decree declaring that Defendant No. 1 had no right to take possession of, or to transfer any property stated in the said will, and that the registered kobala executed by Defendant No. 1, dated the 9th of Falgoun, 1285, was void.

The will was contained in three documents, which together formed the last will of the father *Biswanath*. The first of those documents was dated January, 1856; the second, May, 1862; and the third, August, 1870. The Subordinate Judge held that the will was void, and, consequently, that the widow succeeded to her husband's share. The High Court upon appeal reversed that decision, and held that the Plaintiffs were entitled to it.

The will contained many provisions which could not legally be carried into effect, and which appeared to create a perpetuity, and consequently to render the will invalid.

At the close of the arguments their Lordships reserved judgment, in order that they might carefully consider all the provisions of the three documents read together. They have now done so, and although they cannot, after full consideration, say that the case is free from doubt, they are not prepared to hold that the High Court came to an erroneous conclusion, or to advise Her Majesty to reverse the judgment.

Their Lordships observe that the High Court has declared the deed of conveyance to be void, and that it be cancelled and retained in Court. It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void

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or ought to be cancelled or retained by the Court. It was unnecessary to do more after declaring the Plaintiffs' right than to declare that Defendant No. 1 had no right to take possession of, or to transfer any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the Defendant No. 2.

Their Lordships will humbly advise Her Majesty to affirm the decree, so far as it declares that the Defendant No. 1, *Raikishori Dasi*, had no right or interest in the property mentioned in the schedule "*ka*" attached to the plaint, and that the Plaintiffs are entitled to the same, but that instead of declaring that the conveyance executed by *Raikishori Dasi* in favour of Defendant No. 2, *Syed Abdul Sobhan* is void, and that the said conveyance be cancelled and retained in Court, it be declared that the said conveyance transferred no interest in the property to the Defendant No. 2, and that in all other respects the decree of the High Court be affirmed. This modification of the decree of the High Court does not affect the merits of the case as regards the parties to this appeal, and accordingly the Appellants must pay the costs of the appeal.

Solicitors for Appellants: *Wrentmore & Swinhoe.*
Solicitors for Respondents: *T. L. Wilson & Co.*

RANI SARTAJ KUARI AND ANOTHER . . DEFENDANTS;

AND

RANI DEORAJ KUARI (MOTHER AND GUARDIAN OF LAL NARINDUR BAHADUR PAL) . . . . . PLAINTIFF.

J. C.*
1887
Dec. 6, 7, 8.
1888
Jan. 21.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WEST PROVINCES.

Mitakshara Law—Impartible Raj—Custom—Son's Property at birth in Ancestral Estate dependent on his Right to Partition.

Where an ancestral raj, in other respects governed by the Mitakshara law, is by custom impartible and by custom descendible to a single heir by the rule of primogeniture; in order to render the rajah's alienations invalid as made without the consent of his son it must be shown that the rajah's power of alienation is excluded by the custom or by the nature of the tenure.

In such a raj the son is not a co-sharer with his father. Property in ancestral estate acquired by birth under the Mitakshara law is so connected with the right to partition that it does not exist independently of such right.

APPEAL from a decree of the High Court (May 4, 1883) affirming a decree of the Subordinate Judge of *Gorakhpur* (October 2, 1880).

The action was brought by the Respondent to set aside a registered deed of gift which the Rajah Appellant had executed on the 18th of February, 1877, of seventeen villages, forming part of the raj of *Maholi*, in favour of his younger Rani, on the ground that the Rajah had, according to Hindu law and usage, no right "under any circumstances, except to enjoy possession of the estate during his lifetime," and had no power to alien any part of it.

The Rajah, on the other hand, contended that he was "proprietor of the estate, and authorized to make any transfer he liked," and he averred that "it would be proved on inquiry that on account of the separation of the members of the family and for other reasons transfers of every description have been made

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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in this family from of old without any objection or obstruction being offered."

The Courts below concurred in holding in effect that estates of the raj of *Maholi*, though impartible, were in the nature of joint family property, and were, therefore, according to the law of Mitakshara, inalienable, except for necessary objects, and that the evidence given of previous alienations by Rajahs for various purposes, did not establish the customary right alleged by the Rajah of alienating at his pleasure, and that consequently the alienation in question, which was absolute and not of necessity, was invalid.

The circumstances of the case are stated in the judgment of their Lordships.

The material portion of the judgment of the High Court (*Straight* and *Tyrrell*, JJ.) is as follows:—

"We now revert to the contentions urged by the Defendants' counsel in support of the appeal. Briefly they are—1st. That the Plaintiff has no title to come into Court during his father's lifetime, for he is neither a co-proprietor nor a reversioner; 2nd. That if he has a right to institute a suit, it rests with him to establish the inalienability of the raj, and that under any circumstances the Defendants have conclusively proved the competence of the Rajah to make the gift impeached. The first question involves the consideration of many points of no slight difficulty and complexity, and their examination has been not a little perplexed by a perusal of the numerous authorities to which we were referred in the course of the arguments at the hearing of the appeal. Putting aside the suggestion of custom or usage made in the plaint, which we do not feel called upon to discuss, the position asserted by the Plaintiff apparently resolves itself into this:—The estate now in possession of my father is ancestral; he and I are members of a joint Hindu family, ordinarily subject to the law of the Mitakshara. If I survive him, I must, under that law, succeed to the estate. Although it is admittedly impartible in the sense that I cannot demand partition thereof or have joint enjoyment of the income derived therefrom, yet I have, so to speak, a limited proprietorship therein in the shape of rights to maintenance and succession by survivorship.

In other words, the Plaintiff claims that, except in so far as from the nature of the estate they are inapplicable, his case must be determined according to the principles of the Hindu law, which govern joint families and their property. As a matter of first impression, it appears to us that this contention is based on grounds of justice and good sense, but it will be convenient at once to see how far authority supports it. Turning to the well-known *Shivagunga Case* (1) we find the following apposite passage :—

"'The zemindary is admitted to be in the nature of a principality, impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law, prevalent in that part of *India* with such qualifications only as flow from the impartible character of the subject. Hence, if the zemindar at the time of his death and his nephews were members of an undivided Hindu family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle.'

"The decision of their Lordships in that case proceeded on grounds that left the principles thus laid down untouched, and they seem to establish that a raj or impartible zemindary may be a portion of a joint family estate, and that in the absence of a custom to the contrary succession to it will be regulated by the ordinary rules of Hindu law. In harmony with this view are the following passages in another Privy Council judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayer*, reported in 14 Moore's Indian Appeals, p. 570. Here, again, the subject of dispute was an impartible property, the succession to which was alleged by both parties to be governed by special family custom, which, by the way, neither side proved. Recapitulating a portion of our quotation above from the *Shivagunga Case* (1), their Lordships observe (p. 590): 'Such, also, must be the rule of succession to be applied in the case now under appeal,' and they then go on to remark: 'The High Court in their judgment in the

(1) 9 Moore's Ind. Ap. Ca. 588.

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present case declare that no work of authority or decision has been cited or found directly giving the rule of descent. That this should be so, may perhaps be explained by the fact that primogeniture is the rare exception to the ordinary rule in Hindu families, taking place only upon the descent of some impartible subject as a raj or office, and that in most cases of the kind there has probably been found some local usage regulating such descent.' Later they say 'it will be found from numerous authorities and instances that although the father's property by the general rule descends upon all his sons, yet whenever it becomes necessary to make a distinction, precedence is given to the firstborn.' Again—'It is true that these doctrines occur in passages treating of divisible inheritances, but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can, therefore, go to one only of several sons, the firstborn, by reason of his general pre-eminence, should be preferred to his younger brothers.' 'It is right,' their Lordships add in a concluding paragraph, 'to observe that if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the firstborn son. The inheritances of Hindus which descend on a single heir are almost entirely confined to zemindaries in the nature of a raj and to offices, and it is obviously in accordance with reason and convenience that such succession should devolve upon the son who would in natural course first reach manhood and be capable of discharging the duties attaching to inheritances of this kind.' The conclusion to be deduced, as it appears to us, from these observations of their Lordships is, that where there is no local or family custom overriding the general law, the succession to a raj or impartible zemindary according to Hindu law goes by primogeniture. There is one other decision of the Privy Council—*Doorga Pershad Singh* v. *Durga Konwari* (1)—in which the passage from the *Shivagunga Case* (2) is quoted with approval, and where the following material remarks to the question under our consideration occur: 'The impartibility of the property does not destroy

(1) Ind. L. R. 4 Calc. 201; S. C. Law Rep. 5 Ind. Ap. 149.
(2) 9 Moore's Ind. Ap. Ca. 588.

its nature as joint family property, or render it a separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate.' In this connection we may also refer to the judgment reported in 13 Moore's Indian Appeals, p. 333, in the course of which it is observed (p. 339): 'It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate.' So in *Periasami* v. *Periasami* (1) it is said (p. 70): 'He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession, as belong to the junior members of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers.' We have thought it right to quote at this length from these Privy Council rulings because the counsel for the Defendants greatly pressed upon us a case to be found at page 523 of the 12th vol. of Moore's Indian Appeals, which is known as the *Tipperah Case*, and particularly the following passage on page 540: 'Still, when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction also involving a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership." With deference we can only remark, that we find ourselves wholly unable to reconcile this view of the matter with the opinions expressed in the other judgments of their Lordships from which we have quoted, and by which, in every aspect of the question before us, we prefer to be guided. An impartible raj or zemindary must, it seems us, be one of two things—either a separate estate conferring independent and absolute proprietary powers and carrying its own special rules of succession, or a joint ancestral estate pertaining and belonging to a joint undivided

(1) Law Rep. 5 Ind. Ap. 61.

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family. Because it is impartible it is not necessarily separate, for its impartibility does not 'destroy its nature as joint family property,' nor does it 'make the succession follow the succession of separate estates.' If, then, it can be considered joint property is it to be so merely in name? It must be conceded that the complete rights of ordinary coparcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in, or, perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership. This is matter, however, more pertinent to the second question we shall presently have to consider. As to the first, namely, the competency of the Plaintiff to maintain this suit, we think that, in the absence of any custom to the contrary, he and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the raj of *Maholi* must be regarded as joint family property, in which he has an immediate present interest and a right of succession as eldest son. In this view of the matter the first contention urged for the Defendant fails.

"In support of his second point, namely, that the onus was on the Plaintiff to establish the alienability of the raj—the counsel for the Appellant referred us to *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (1). We have very carefully perused that ruling of their Lordships of the Privy Council, as also the judgment of the High Court of *Calcutta* (2), from whose decision the appeal was preferred, and it seems to us sufficient to say that the property to which the litigation related was situated in *Lower Bengal*, where the parties would be subject to the Dayabhaga and not the Mitakshara. Under the general law, therefore, by which they were governed, the Rajah had power to make alienations, and it was for those who denied his right to do so, to establish a custom of inalienability that would override the general law. In the case before us, however, the Mitakshara is the law of the parties; and if we have correctly held that the

(1) Law Rep. 8 Ind. Ap. 248. (2) Ind. L. R. 5 Calc. 113.

Mâholi raj estate is joint family property, then, save for urgent or necessary expenses of the family, no one member, even though he stands in the position of father or manager, can alienate it, or any part of it, without the consent of all. Such at least is the view of the Hindu law that has been always recognised by this Court in a long, and as far as we know, unbroken series of decisions from which we should hesitate to depart. It cannot be pretended that an absolute gift of seventeen of the best and most valuable villages of the raj to a junior wife is within the exception. On the contrary, to recognise such a power in a Hindu father would defeat the first principles of the Hindu law of inheritance and render the continuance of the joint family system impossible. We put it to the counsel for the Defendants in the course of his argument, that if he carried it to its logical conclusion, a Rajah might dissipate the whole of his ancestral estate, and of his own free will extinguish the raj, and he frankly admitted that he did not shrink from going that length. If for a moment we can entertain questions of policy, we doubt the expediency or propriety of allowing any such doctrine to go abroad. Looking at the matter in its practical aspect, and having regard to the origin and growth of these small powers or principalities, which are not without purpose or usefulness, we are not prepared to admit, at any rate so far as the law governing these provinces is concerned, except where it is clearly overridden by well-recognised family custom, any such absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property. For to do so would involve the inconsistency that while the Rajah or incumbent for the time being in no way controls the succession after him, he may nevertheless effectually deprive his successor of anything to succeed to. Until corrected by higher authority, we must hold that the law of Mitakshara is applicable to the present case, and that the Defendant Rajah and the minor Plaintiff being members of a joint Hindu family, and the estate of the raj being joint ancestral property, the alienation impeached by this suit, not having been made for necessary purposes, is void, and must be set aside."

The High Court then found on the evidence that it did not

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establish "the fact, much less the custom, of any alienation so large in its scope and so absolute in its character as that made by the present Rajah in favour exclusively and for ever of his younger Rani."

Doyne, for the Appellants, contended that the onus was on the other side to shew that the raj of *Maholi* was of the nature of joint family property, and that it had not been shewn. On the Respondent's own evidence it had been shewn that at least nine-tenths of the raj had been from time to time alienated without any objection made by any son or heir. Consequently it should have been held that the Rajah for the time being possessed full power of alienation and was not controlled in his exercise of such power by his sons. The contention necessary to support the appeal was that the Rajah had power to aliene in favour of his second wife. Reference was made to *Rajah Ramnarain Singh* v. *Pertum Singh* (1); *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* (2); *Thakoor Kapilnauth Sahai Deo* v. *The Government* (3). Those cases are distinguishable as applying to ancestral estate never diminished by any alienation: *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (4); *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (5); *The Tipperah Case* (6). It was erroneous to apply the Mitakshara rule of sons controlling their father's alienation to an ancestral impartible raj where a custom of unfettered alienation by its holders for 300 years had been established.

Jeune, and *R. C. Saunders*, for the Respondents, contended that the property in question was joint family estate, governed by the ordinary Mitakshara law, though descendible to a single heir. It could be neither partitioned nor alienated in the absence of necessity or without the consent of sons. No custom of alienation was established by the evidence, and no proof of necessity for the particular alienation proved. The cases in the 9th, 11th, and 13th *Bengal* Law Reports endeavoured to be distinguished on the other side were relied upon. This was joint family estate

(1) 11 Beng. L. R. 397.
(2) 9 Beng. L. R. 274.
(3) 13 Beng. L. R. 445.
(4) Law Rep. 8 Ind. Ap. 248.
(5) 13 Moore's Ind. Ap. Ca. 333.
(6) 12 Moore's Ind. Ap. Ca. 540.

for purposes of succession, and there was community of interest on the part of all members though the right of enjoyment and possession was exclusive. It was the community of interest which placed fetters on alienation, which were not removed because one member had exclusive possession and the others had lost by the custom their right of partition. Reference was made to the *Shivagunga Case* (1). The ordinary law regulated succession and alienation and everything to which the custom did not relate. The custom established impartibility and descent to a single heir, nothing further. The *Tipperah Case* (2); *Sri Rajah Yanumula Gavuridevamma Garu* v. *Sri Rajah Yanumula Ramandora Garu* (3).

Doyne, for the Appellant, was not called on to reply.

1888
Jan 21.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal is whether a gift of seventeen villages made by the Appellant *Rajah Bhawani Ghulam Pal*, on the 18th of February, 1887, to the Appellant *Rani Sartaj Kuari*, his younger wife, is valid. The suit was brought by the Respondent, as mother and guardian of *Lal Narindar Bahadur Pal*, the minor son of *Bhawani Ghulam Pal*, against the Appellants. The plaint stated that the estate of *Maholi* had been in the Plaintiff's family for a very long time, and, according to the custom of the country and its neighbourhood and the provisions of Hindu law, the eldest son of the Rajah succeeds to the estate; that since the establishment of the raj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognised usage, the successor of the Rajah and occupant of the gaddi had had no other right under any circumstances except to enjoy possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The plaint then stated the gift, and prayed for a

(1) 9 Moore's Ind. Ap. Ca. 588.
(2) 12 Moore's Ind. Ap. Ca. 540.
(3) 6 Madras, H.C. R. 105; S. C. 13 Moore's Ind. Ap. Ca. 333, 339, 340.

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decree for establishment and declaration of the Plaintiff's right by voidance of the deed of gift. The written statements of the Defendants alleged that *Bhawani Ghulam Pal* was proprietor of the estate and authorized to make any transfer, and it would be proved on inquiry that, on account of the separation of the family and other reasons, transfers of every description had been made in the family from of old, without any objection or obstruction being offered.

The history of the family is given in the judgment of the High Court. The estates, which are considerable, lie in the parganas of *Tanda* and *Akbarpur Fyzabad*, in the province of *Oudh*, and *Maholi* and *Rasalpur*, in the district of *Baoti*, in the North-Western Provinces. It would appear that, some 300 years ago, two brothers, named *Alakdeo* and *Tilakdeo*, *Surajbansi* Rajputs, coming, as they alleged, from *Kumaon*, invaded the locality in which the property is situated, and killing one *Kaulbil*, the then Rajbhar, appropriated his lands, and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the *Delhi* emperors the title of "Pal," which has now for a long course of years been attached to the family. It was admitted that the raj or estate was impartible, that there was in the family the custom of primogeniture, and that the family was governed by the law of the Mitakshara. The evidence as to the size of the estate originally was very vague, some witnesses saying it contained 600 or 700 villages, and others 1300. At the time of the gift in question it did not contain more than 100. The estate had been thus reduced by gifts by successive Rajahs to younger members of the family, who were called Babus, for maintenance, and to Brahmins for religious or charitable purposes. The former classes of gifts were called "birt" and the latter "shankalp." The former were stated by the witnesses to have been of considerable extent, some being of fifty or more villages. It did not appear that a Rajah had ever made an alienation by way of sale of any part of the estate.

The Subordinate Judge framed the following issues:—

"Is the Defendant competent to execute the deed of gift during his lifetime in favour of his second wife according to the

family custom and Hindu law? Is the deed of gift legal? Has the Plaintiff no right according to Hindu law to get it cancelled? Is the Plaintiff alone competent to sue in the presence of other rightful heirs, and is the Plaintiff's claim legal or not?" The Subordinate Judge decided that the deed of gift was invalid, and made a decree for the Plaintiff. He appears to have held that the estate being impartible it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the Defendant had failed to prove this.

The Defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the Plaintiff and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the raj of *Maholi* must be regarded as joint family property in which he had an immediate present interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing these (the North-West) Provinces is concerned, except where it is clearly overriden by well recognised family custom, an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the Defendant Rajah and the minor Plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, and the law of the Mitakshara being applicable, the gift not having been made for necessary purposes was void, and must be set aside. Accordingly the appeal was dismissed, with costs.

A similar view of the law was taken by the High Court at *Calcutta* in *Ram Narain Singh* v. *Pertum Singh* (1).

The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dáyabhága, the law in *Bengal*, is found in ch. 1, sect. 1, v. 27, where it is said that property in the paternal or ancestral estate is by birth, and the father is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor. In this case, if there were

(1) 11 Beng. L. R. 397.

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no family custom the Rajah's power over the estate would be governed by this law, and the gift in question would be void. But, as was said by this Committee in the *Tipperah Case* (1), "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." It is admitted that the raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty.

The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Rajah or Zemindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. The saying in the *Shivagunga Case* (2), that "the zemindary, though impartible, was part of the common family property," must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case. In *Doorga Pershad Singh* v. *Durga Kunwari* (3), it is evident from what is quoted by the High Court that this question was not considered. In *Periasami* v. *Periasami* (4) the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shewn by the previous sentence to be the younger brothers "taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir." *In Rajah Yanumula Venkayamah* v. *Rajah Yanumula Boochia Vankondora* (5), which was quoted in the argument for the Respondent for a passage in the judgment at p. 339, where the estate is spoken of as being part of the common family property, though impartible, the question in the suit being in

(1) 12 Moore's Ind. Ap. Ca. 542.
(2) 9 Moore's Ind. Ap. Ca. 592.
(3) Ind. L. R. 4 Calc. 201.
(4) Law Rep. 5 Ind. Ap. 61.
(5) 13 Moore's Ind. Ap. Ca. 333.

regard to the succession, their Lordships at p. 340, after noticing evidence of the grants of portions of the estate, say, "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate in favour of the junior members of the family, who, but for the impartibility of the estate, would be coparceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the coparcenary in it which under the Mitakshara law is created by birth does not exist.

And in *Baboo Beer Pertab Lahee* v. *Maharajah Rajender Pertab Lahee* (1), the case of the zemindary of *Hansapore*, in *Behar*, where the Mitakshara law prevails, an impartible raj, which by family usage and custom descended according to the rule of primogeniture, subject to the burthen of making babuana allowances to the junior members of the family for maintenance, the question was whether the Rajah had power to make a testamentary disposition of the raj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "*cessante ratione cessat et ipsa lex.*"

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common" (Mitakshara, ch. 1, sect. 1, v. 30).

The argument in support of the view of the High Court appears to be that, although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient to enable them to prevent an alienation. The learned Judges of the High Court say: "It must be conceded that the complete

(1) 12 Moore's Ind. Ap. Ca. 1.

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rights of ordinary coparcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

In the case in the 11th *Bengal* L. R. 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405) in the judgment: "It appears to me, then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family, and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or incumber the estate excepting upon a justification of a family necessity." Both Courts appear to have thought that, in order to prevent alienation by the father, there must be a co-ownership in the son or sons.

The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition, that it does not exist where there is no right to it. In the *Hansapore Case* there was a right to have babuana allowances as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed. In *Bengal* there is joint family property, but where property is held by the father as its head his issue have no legal claim upon him or the property except for their maintenance.

He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition: Dáyabhága, ch. 1. In the case of the raj of *Patcum*, in *Chota Nagpore*, which was admitted to be an impartible raj, and one in which the custom of primogeniture existed, it was held by the High Court at *Calcutta* (1), that it was necessary for the Plaintiff to shew that there was some custom which would prevent the operation of the general law, empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed (2). In *Naraen Khootia* v. *Lohenath Khootia* (3) it was held by the same High Court that the fact that the raj of *Chota Nagpore* is impartible does not prevent the Maharajah for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the law of the Mitakshara. It had been previously held by the same Court in a case in 13 *Bengal* L. R. 445, where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shewn to be inalienable. Their Lordships think this is the correct view.

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the onus was upon the Defendants (the Appellants) to prove that by custom the estate was alienable, and they have found that the custom was not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They

(1) Ind. L. R. 5 Calc. 113. (2) Law Rep. 8 Ind. Ap. 248.
(3) Ind. L. R. 7 Calc. 461.

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have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the Plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability. For the foregoing reasons, their Lordships are of opinion that the Plaintiff has failed to shew that the gift ought to be declared to be invalid, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The Respondent will pay the costs of this appeal.

Solicitors for Appellants: *Ford, Ranken Ford, & Ford.*
Solicitors for Respondents: *Bird & Moore.*

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Nov. 9, 10, 18, 19, 22, 23; Dec. 17.

THAKUR SHANKAR BAKSH . . . . . PLAINTIFF;

AND

DYA SHANKAR AND OTHERS . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Res Judicata—Suit to redeem a Mortgage—Cause of Action the same, though Mode of Relief prayed is varied.

In a suit in 1883 to redeem a mortgage made in 1853 of certain villages in *Oudh* subsequently included in the talukdari sanad of the Respondent, it appeared that in 1864 the Plaintiff's ancestor had sued in the Settlement Court to redeem the same mortgage, which suit had been dismissed under sect. 114 of Act VIII. of 1859:—

Held, that although the suit in 1864 prayed for sub-proprietary right and the suit in 1883 for superior proprietary right the difference was solely with regard to the mode of relief, and the cause of action being in either case substantially the same, viz., for redemption of a mortgage, the latter suit was barred.

APPEAL from a decree of the Judicial Commissioner (June 3, 1885), reversing a decree of the District Judge of *Lucknow* (April 7, 1884), and dismissing the Appellant's suit with costs.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

The Appellant's case was that his grandfather, *Bhup Singh*, in 1864, acting under the mistaken view that the entry of the mortgaged villages in the talukdari sanad of the first respondent barred his right to redeem the superior proprietary right therein, brought a suit to redeem the under-proprietary right in the same; alleging in his plaint that he had already paid to the mortgagee the sum of Rs.3000, and was and had been ready and willing to pay the balance, but that the mortgagee, on the strength of the sanad granted to him, refused to allow the mortgagor to redeem the villages, and praying that on payment of the balance of the mortgage debt he might be put into possession of the villages as under-proprietor holding a sub-settlement thereof.

On the 18th of July, 1868, after the death of *Bhup Singh*, the suit was "dismissed on default," the Plaintiff's heir, the above-named Appellant, being absent on account of illness; and the Defendant being also absent.

Various unsuccessful proceedings, detailed in the judgment of their Lordships, were taken to set aside this order of dismissal; the latest being in 1871. Accordingly in 1883 the Appellant filed a plaint, which after setting out the facts of the mortgage and of the acquisition of an interest therein by the second, third, and fourth Respondents, stated that the Appellant had, under sect. 83 of Act IV. of 1882 (the *Transfer of Property Act*), deposited on the 19th of May, 1883, the mortgage money in Court for payment to the Respondents, but that, on the 14th day of June, 1883, which was the Khali Fasl of the month of Jeth, the date fixed for the release of the mortgaged property in the mortgage deed, the Respondents had refused to restore the property to the Appellant, and it prayed for a decree for redemption of the mortgaged villages, and generally for consequent relief.

The first Respondent denied the Appellant's right to redeem, and charged that the amount deposited in Court by the Appellant was not the full amount due in respect of the mortgage. He pleaded, amongst other matters, the suit of 1864, and the subsequent applications therein, as bars to the further maintenance of the present suit, and set up a written agreement of the 6th of December, 1853, which he alleged had been executed by *Bhup Singh*, deceased, at the same time as the mortgage of that date,

and under which he claimed to be entitled to receive interest on the amount of the mortgage debt at 2 per cent. per mensem in addition to the rents and profits of the mortgaged property.

The District Judge was of opinion that the suit of 1864 was no bar to the present suit; that there was nothing to hinder the mortgagor in such a case as this from redeeming. He disbelieved the case of the Respondent as to the execution of the agreement for interest, and gave the Appellant, who had paid into Court the full amount of the mortgage debt, a decree for recovery of the mortgaged property with costs.

The material passage of his judgment was:—

"The claim for redemption was for a sub-settlement tenure, it being supposed that the sanad would bar claim for proprietary right.

"I think there can be no doubt that any further claim for sub-settlement of mauza *Khanpur* against *Dya Shankar* would be barred, but the Plaintiff's contention is that the practice of the Settlement Courts was to try each grade of right separately, and that the loss of one grade of right does not entail the loss of any other that could be separately sued for where in practice each grade of right is held to constitute a separate cause of action. I think a decision on one grade of right is no bar to a fresh trial on another."

The Judicial Commissioner held as follows:—

"It appears to me that the suit brought by the Plaintiff-Respondent in 1864 for the recovery of the mortgaged property was in all essentials the same as the present suit. It is not very clear on what grounds the Plaintiff-Respondent in 1864 conceived that he was debarred from seeking to redeem the same proprietary rights which had been mortgaged in 1853. He was in all probability influenced by a mutual agreement or understanding between talukdars not to sue one another for redemption of mortgaged villages included in their respective talukdari sanads."

"The Appellant is now without redress, but this is of the less consequence since the principle has not heretofore been recognised of a talukdar suing another talukdar for redemption of a village in the sanad of the latter."

"I do not think it can be held that sect. 6 of Act I. of 1869

conferred a fresh cause of action on the Plaintiff-Respondent, or that it relieved him from the consequences of having permitted judgment to be given against him by default in 1864.

"It may probably have been the practice of the Settlement Courts to try claims to different classes of rights separately, that is to say, a claim to full proprietary right if dismissed, would not necessarily bar a second claim to an under-proprietary tenure. But it is difficult to see how this practice could have been followed in suits for redemption of mortgaged property in which a plaintiff would be bound to include in one suit whatever rights he might have mortgaged under the same deed.

"I do not think the Plaintiff-Respondent can now be permitted to urge that he had no cause of action in 1864, not having paid the full mortgage money, or that *Hira Lal* (the Defendant's partner in the mortgage) was not a party to the suit. It is sufficient that a suit for redemption was brought by the Plaintiff-Respondent. He cannot now plead that he had no cause of action. *Hira Lal* (who is represented by Defendants Nos. 2, 3, 4) was merely the assignee of part of this mortgaged property and therefore held under the same title as the mortgagee.

"In my opinion the suit is barred under the provisions of sect. 114 of Act VIII. of 1859, and sect. 103 of the Civil Procedure Code."

Doyne, and *Branson*, for the Appellant, contended that the suit in 1864 and the subsequent proceedings did not bar the present. Sect. 114 of Act VIII. of 1859 corresponded with sect. 103 of Act XIV. of 1882, and did not apply. No order in the case was made under that section; the order of the 18th of July, 1868, not having been made thereunder but under sect. 110. Even if there had been it would not have been a bar; for neither in 1864 nor later was the mortgagor in a position to sue under the deed for proprietary right. He could not before the Act of 1869 claim that right from a mortgagee in whose talukdari estate and in whose sanad were comprised all the villages in suit. Act I. of 1869, sect. 6, authorized such claim. In 1864 the utmost he could claim was sub-proprietary right, the present cause of action had not then arisen in respect of superior right. However the former suit was not dismissed, the case was disposed of under.

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sect. 110, under which there was no right of appeal, but which provided for re-instatement.

Mayne, and *Arathoon*, for the Respondent, contended that this point was not taken in the lower Court. They referred to sect. 119, and contended that the order was made and had been treated by the Appellant as made under sect. 114, and not under sect. 110.

SIR BARNES PEACOCK referred to sect. 6 of Act I. of 1869, according to which the effect of the Defendant's settlement was that the mortgagor was not deprived of his right to redeem. If the Plaintiff had not a right to a sub-settlement his former suit must have been dismissed had it been heard, and such dismissal would not interfere with his present claim.

LORD FITZGERALD said that their Lordships would adjourn the case so as to hear one counsel on either side argue the point suggested on the authorities.

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Doyne (*Branson*, with him) referred to Act XV. of 1865 and Act. XIII. of 1866. He contended that sect. 114 of Act VIII. of 1859 did not apply. [SIR BARNES PEACOCK:—The former suit was practically only a suit for sub-settlement.] The effect of Lord *Canning's* confiscation was that the original rights of this mortgagor under his deed had been swept away. By the regrant the mortgagor obtained no right to redeem, or any right, title, and interest in the villages, whether of a superior or sub-proprietary character. But by Act I. of 1869, sect. 6, he did obtain a right to redeem, notwithstanding the confiscation: *Shama Pershad Roy Chowdhry* v. *Hurropershad* (1); *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (2); *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (3); *Ranee of Chillaree* v. *Government of India* (4). The intention of the Government was to restore generally all the titles which had been confiscated: *Thakoor Hardeo Buksh* v. *Thakoor Jawahir Singh* (5); *Brij Indur Bahadoor Singh* v. *Ranee Janki Koer* (6); *Nawab Malka Jahan Sahiba* v. *Deputy Commis-*

(1) 10 Moore's Ind. Ap. Ca. 203, 209.
(2) 12 Moore's Ind. Ap. Ca. 112.
(3) Law Rep. Ind. Ap. Supp. Vol. p. 220.
(4) Ibid. p. 237.
(5) Law Rep. 4 Ind. Ap. 178, 196; see also Law Rep. 6 Ind. Ap. 161.
(6) Law Rep. 5 Ind. Ap. 1.

sioner of Lucknow (1); *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer* (2). In this particular case there was no particular act, representation, or contract from which any trust by the grantee of the sanad could be inferred. Therefore his case rested entirely on sect. 6. Moreover, if the Plaintiff had no right to redeem until he had deposited in Court the full amount due, the former action was brought without any cause of action existing at the time, and therefore its dismissal for default did not constitute *res judicata*. [SIR BARNES PEACOCK referred to *Nelson* v. *Couch* (3) and to *Phillips* v. *Ward* (4) mentioned in 2 *Smith's* Leading Cases, p. 849, to shew that in order to constitute a *res judicata* it must be shewn that the Plaintiff could have recovered in the former suit that which he seeks in the second: see *Gobindchunder Addya* v. *Afzul Rabbani* (5).]

Mayne (*Arathoon*, with him), for the Respondent, contended that the cause of action was the same in this suit as it had been in 1864. That cause of action failed the Plaintiff because his case was one of conditional sale, on breach of which condition the sale had become absolute: *Thumbasawmy Mudelly* v. *Mahomed Hossein Rowthen* (6); *Pattabharamier* v. *Vencatarow Naicken* (7). His title to relief therefore was gone, and the Act of 1869 did not confer a new right. Even if sect. 6 of Act I. of 1869 would have placed him in a better position had he sued thereafter for the first time, still, as he had elected to sue before it, the Act did not undo the state of things which he had created. The right alleged by the Appellant was not a right of property at all, and therefore not a right upon which the confiscation or the Act could operate. The right alleged is to have a re-transfer on payment of money—a right of contract. See terms of proclamation, Law Rep. 6 Ind. Ap. 75, and sect. 25 of Indian Council's Act, 1861, and the two letters scheduled to Act I. of 1869: *Gouri Shanker* v. *Maharajah of Bulrampore* (8); *Prince Mirza Jehan Kadr Bahadoor* v. *Nawab Budshoo Buhoo Sahiba* (9). If the intention

(1) Law Rep. 6 Ind. Ap. 63, 73.
(2) Law Rep. 9 Ind. Ap. 41.
(3) 15 C. B. (N.S.) 99.
(4) 2 H. & C. 717.
(5) Ind. L. R. 9 Calc. 426.
(6) Law Rep. 2 Ind. Ap. 241.
(7) 13 Moore's Ind. Ap. Ca. 563.
(8) Law Rep 6 Ind. Ap. 1.
(9) Law Rep. 12 Ind. Ap. 124.

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of the Act was as contended for by the Appellant its language would have been more explicit: *Gardiner* v. *Wilks* (1). It could not be construed so as retrospectively to affect a decree between the parties existing at the time of the enactment, and re-establish relations which by decree had been held to have ceased.

Doyne, replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 6th of December, 1853, *Bhup Singh*, the grandfather of the Appellant, describing himself as zemindar and talukdar of *Pahu* and *Golaria*, &c., by an agreement of that date, mortgaged three villages in pargana *Maurawan*, in *Oudh*, to the Respondent *Dya Shankar* for three years for Rs.7441. 6*a*., the mortgagee to have the profits and produce and being put in possession. And the mortgagor stipulated that he would repay the mortgage money in Khali Fasl, and redeem the mortgaged villages, and, "unless he shall have paid the mortgage money in full to the said mortgagee he shall not redeem the villages; at the time the mortgage money shall be paid up by the declarant (mortgagor) he shall have the mortgaged villages released in Khali Fasl."

On the 6th of September, 1883, the Appellant brought a suit in the Court of the District Judge of *Lucknow* against the Respondent to redeem the mortgage. Other persons were made Defendants as having become entitled to a half share in the right of the mortgagee, but the case may be treated as if *Dya Shankar* had remained sole mortgagee. The plaint stated the mortgage; that the three years expired on the 6th of December, 1856, and although the villages were included in the talukdari sanad of *Dya Shankar*, yet, under the terms of the mortgage deed and sect. 6, Act I. of 1869, the Plaintiff was entitled to redeem; that under sect. 83, Act IV. of 1882, the Plaintiff had deposited the mortgage money in Court, but on the 14th of June, 1883, the Khali Fasl, the Defendants refused to redeem the property.

(1) 3 App. Cas. 582.

The written statement of *Dya Shankar* stated that "on the 23rd of June, 1864, *Bhup Singh*, Plaintiff's ancestor, filed against the Defendant a regular suit for redemption of his property, and continually absented himself; on the death of *Bhup Singh*, which took place about the end of 1875, the Plaintiff succeeded him, and he also failed to prosecute the case, so much so that on the 18th of July, 1868, the claim was dismissed for want of prosecution, under sect. 114, Act VIII. of 1859, in the presence of Defendant and absence of Plaintiff." It was further stated that on the 7th of August, 1868, the Plaintiff filed an application for re-hearing, which was rejected on the 13th of August; that another application for re-hearing was filed on the 15th of September, 1868, which also was rejected on the 17th of March, 1871; that an appeal was then preferred in the Court of the Commissioner, which was also rejected.

The sections of Act VIII. of 1859, which was then in force, applicable to the dismissal of a suit, are 110, 114, and 119. Sect. 110 provides for the dismissal where neither party appears, and when a suit is dismissed under it the Plaintiff is at liberty to bring a fresh suit, unless precluded by the rules for the limitation of actions, or if within thirty days he satisfies the Court that there was a sufficient excuse for his non-appearance the Court may issue a fresh summons upon the plaint already filed. Sect. 114 provides for cases where the Defendant appears and the Plaintiff does not appear, and then "the Court shall pass judgment against the Plaintiff by default unless the Defendant admits the claim," and it says that when judgment is passed against a Plaintiff by default he shall be precluded from bringing a fresh suit in respect of the same cause of action.

Bhup Singh had, as was alleged, brought a suit in the Settlement Court on the 23rd of June, 1864, and the order, as it is called, of the 18th of July, 1868, appears to have been made in consequence of the Financial Commissioner, on the 29th of May, 1868, calling the attention of the Settlement Officer to the provision in Act VIII. of 1859, where the Plaintiff does not attend to the process of the Court. The Settlement Officer appears upon that to have given notice to the parties, and the judgment says that "the 18th of June was fixed for the hearing, on which

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day Plaintiff applied for a month's delay, it being the entering into engagements with tenants, and the Defendant's agent agreeing to the delay, it was granted, and this day, the 18th of July, fixed for the hearing, but Plaintiff is not present or represented by any accredited agent." At the foot of the judgment is the word "decree" and the signature of the Settlement Officer. There is also in the proceedings a paper in a tabular form, signed by the Settlement Officer, which seems to be the record of the decree. In a column headed "Particulars of Case" are the words "Plaintiff's suit for redemption of entire village *Khanpur* by right of inheritance and possession up to 1270 F. dismissed on default." The words "dismissed on default" were strongly relied upon before their Lordships as shewing that the suit was dismissed under sect. 110, but in another column it is stated that the decree was in favour of the Defendants. The proceeding of the Settlement Court is recorded in such a loose way that no certain inference can be drawn from it as to the section under which the decree was made. The matter, however, did not rest there. On the 7th of August, 1868, the Plaintiff applied that the suit might be reinstituted under sect. 110. This application was rejected on the 13th of August. On the 15th of September, 1868, the Plaintiff made an application to set aside the order of the 18th of July. The order upon this application was not made until the 17th of March, 1871. The cause of this delay does not appear. The application was refused by the Settlement Court because it was not made within thirty days after the 18th of July. The Plaintiff then appealed to the Commissioner of the *Rae Bareli* Division, who dismissed the appeal, saying "that the order of the 13th of August ought to have been appealed." The explanation of this will be found in sect. 119. It has been seen that when an order is made under sect. 110 there is no appeal; the Plaintiff is at liberty to bring a fresh suit. But sect. 119 provides that in all cases of judgment against a plaintiff by default (that is cases under sect. 114) he may apply within thirty days from the date of the judgment for an order to set it aside, and that in all cases in which the Court shall pass an order under that section for setting aside a judgment the order shall be final, but in all appealable cases in which the Court shall reject the

application an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable. Thus the Plaintiff, by appealing against the order of the 17th of March, 1871, treated the application of the 15th of September, 1868, as an application to set aside an order made under sect. 114, and when the Commissioner said that the order of the 13th of August ought to have been appealed he must have considered that the order of the 18th of July, 1868, was made under that section. Indeed the objection that it was made under sect. 110 does not seem to have been taken in the Lower Courts. No issue was framed by the District Judge distinctly, if at all, raising it, and there is no notice of it in his judgment. The Appellate Court says the suit was dismissed under sect. 114, and the whole of the judgment assumes that it was. Their Lordships are satisfied that the dismissal of the suit was under sect. 114.

It is, therefore, necessary to decide whether the present suit is for the same cause of action as the former. The plaint in the suit has been stated. The suit in 1864 was begun by a petition to the Settlement Court, which then had the jurisdiction. It stated the claim thus: "Claim to order proprietary (sub-settlement) right by redemption of mortgage in respect of villages *Khanpur, Rajivara,* and *Sarai Mobarak,* which were mortgaged to Defendant on the 4th Rabi-ul-awal, 1270 H., in lieu of Rs.7441. 6*a.*, with stipulation that whenever, after expiry of the period of three years, the mortgagor paid the mortgage money in full, he shall redeem the property. Accordingly he paid Rs.3000. out of the aforesaid amount on the 7th Ramzam 1273 H. He is ready to pay up the balance, Rs.4441. 6*a.*, but the Defendant does not act up to the terms of the mortgage deed." The prayer was that the Plaintiff might, on payment of Rs.4141. 6*a.* in cash, be put in possession of the mortgaged villages as under-proprietor, holding sub-settlement in accordance with the provisions of the rules of the Government on the subject. The proceedings in the Settlement Court appear to have been in a different form from that now in use in the District Court, viz., plaint and written statement, but no objection has been taken in the Lower Courts that the suit in 1864 was not in proper form, or that it was then necessary to deposit the money. That has been made

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necessary by a subsequent Act. That in the former suit the Plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action. It is not, as the District Judge thought, part of the cause of action. It is the manner in which the redemption of the mortgage was to be given. Various questions have been raised and very fully argued before their Lordships in order to shew that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion that the causes of action are not the same, and that the judgment of the Additional Judicial Commissioner, who held that the suit was barred under the provisions of sect. 114, is wrong. They will, therefore, humbly advise Her Majesty to affirm his judgment, and to dismiss the appeal. The Appellant will pay the costs of it.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *T. L. Wilson & Co.*

RAJAH MADHO SINGH . . . . . PLAINTIFF; J. C.*

AND 1888

AJUDHIA SINGH AND OTHERS . . . . DEFENDANTS. *Feb.* 7.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Rent Act (*XIX. of* 1868), *s.* 83, *cl.* 4—*Oudh Sub-settlement Act* (*XXVI. of* 1866)—*Oudh Land Revenue Act* (*XVII. of* 1876), *s.* 158.

Where by the terms of their lease the Defendants could only be ejected and have their lease cancelled "according to any law in force in *Oudh* with respect to persons holding an under-proprietary right in land," but by a later agreement the lessees might be ejected for default in rent:—

Held, in a suit brought by the talookdar under the *Oudh Rent Act* for ejectment of the Defendants and cancelment of lease that the lease could not be cancelled under the *Rent Act*, and that the remedy under the agreement lay in the Civil and not in the Rent Court.

APPEAL from a decree of the Judicial Commissioner (April 9, 1885) affirming an order of the Commissioner of *Rae Bareli* which affirmed an order by the Deputy Commissioner of *Suttanpur*.

The suit was brought by the Appellant against the twenty-five Respondents for cancellation of a lease of the land in suit (the entire village of *Pindaria*) and also for possession. The suit was brought under the *Oudh Rent Act* and was based on the allegations that there were outstanding arrears of rent under two decrees, and that the Respondent had violated the conditions of an agreement of the 18th of March, 1879.

The terms of the lease were stated in a consent decree (Oct. 2, 1869) of a Settlement Court to the effect that the Respondents should have an hereditary but not transferable lease at a rent of Rs.2999 per annum "in default of payment of which the lease will be liable to cancellation," as also for default by decree of any competent Court, according to any law on the subject which may be from time to time in force in *Oudh* with respect to persons possessed of an under-proprietary right in land.

On the 18th of March, 1879, the Respondents entered into an

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agreement with the Appellant, wherein after reciting that up to that date arrears of rent decreed and not decreed, amounting to Rs.3775 8*a.* 6*p.* were due from them, "and in consequence thereof we are liable to be dispossessed by the Court;" but that as the Rajah had at their request granted them time, they covenanted that they would repay the said amount due without interest by certain specified instalments from 1286 F. to Jeyt. 1292 F. And they further agreed that should there be breach in the payment of any one instalment, the Rajah could recover the money, plus 2 per cent. per month interest, out of their property of all description, "and in return for this default eject us and our co-sharers from the lease through the Civil Court or any other way he may be able to do it, without following the procedure laid down by the Rent Act."

On the 20th of April, 1882, the Appellant recovered a decree against the Defendants for arrears of rent of 1286 F., which, as reduced on appeal, amounted with costs to Rs.2423 1*a.* 9*p.*

On the 27th of February, 1883, the Appellant recovered another decree against them for arrears of rent for 1289 and 1290 F., amounting to Rs.1991 2*a.* 0*p.*

The plaint prayed, under sect. 83, cl. 4, of the *Rent Act*, for a decree of ejectment with cancellation of lease.

The main issue was—are the Defendants liable to cancellation of lease and ejectment for non-payment of arrears under the terms of (*a*) their settlement decree, (*b*) the agreement of the 18th of March, 1879.

The Deputy Commissioner decided that the lease was held on the terms mentioned in the settlement decree, and that those terms were not modified by the subsequent agreement; that it was *res judicata* that a suit under this agreement was untenable under the *Rent Act*; that by the settlement decree the lease was to be cancelled only "according to the law in force with respect to persons possessed of an under-proprietary right in land. No such law existed, but the *Rent Act* did, and the Settlement Court must have recognised that the decree precluded ejectment until a law authorizing it was passed regarding persons possessing under-proprietary right. By the terms of the decree the Court can cancel the lease only according to some law which has not

yet come into force; to cancel the lease or eject the Defendants under the *Rent Act* would be in flat violation of the decree."

The Commissioner of *Rae Bareli* affirmed this finding. He agreed that the violation of the agreement of the 18th of March, 1879, did not necessarily constitute a breach of the conditions of the original lease, and that action under its special clauses must be taken in the Civil Courts and not in the Rent Court at all.

He further observed that the *Oudh Rent Act* was in force when the lease was ratified, and that it could hardly have been the intention of the Courts sanctioning such lease to allow ejectment under sect. 41 and clause 4 of sect. 83. Had the stipulation "with respect to persons with an under-proprietary right in land" been absent, the lessees might be regarded in the position of tenants, and ejectment under those sections might be justified, but in the face of that stipulation they must be treated as under-proprietors, and as under-proprietors cannot be ejected the Respondents cannot be ejected either; that sect. 158 of Act XVII. of 1876 provided an effective remedy, and it was under that section that Plaintiff should have proceeded instead of allowing hopeless arrears to accumulate as he had done.

The Judicial Commissioner dismissed an appeal therefrom with costs.

Doyne, and *C. W. Arathoon*, for the Appellant, contended that the Respondents were occupancy tenants and not under-proprietors; the *Rent Act* (XIX. of 1868) defines the latter as persons possessing both a heritable and transferable right of property in land for which they are liable to pay rent. Reading sect. 83, cl. 4, disjunctively, only a "tenant" no doubt can be ejected, but it was argued below that any lease can be cancelled, including the present lease. The Act, however, contemplates that an under-proprietor's tenure may be sold, not that his tenure or lease may be cancelled. Besides, in the agreement of 1879 the Respondents admitted that in default of payment of of the stipulated rent it was liable to cancellation. The suit was cognisable by the Rent Courts whether brought under the decree or under the agreement. See Act XXVI. of 1866, sects. 5

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and 7. The word under-proprietor in the decree of 1869 included all who had less than full proprietary rights, *i.e.*, occupancy tenants. Sect. 158 of Act XVII. of 1876 gave the Plaintiff the option of proceeding either under the *Rent Act* or under that section.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the three Courts below, who were unanimous in their judgments, are correct in the opinions which they have formed. It is clear that under the decree, by way of compromise, the parties had not a right to cancel the lease under the terms of the *Rent Act*.

With regard to the agreement, their Lordships are of opinion that the Courts below were right in holding that the Plaintiffs could not seek to enforce that agreement by suing in the Rent Court. Their only remedy would have been to have sued in the Civil Court upon that agreement.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner.

Solicitors for the Appellant: *T. L. Wilson & Co.*

MAHOMED BUKSH KHAN AND OTHERS . DEFENDANTS; J. C.*

AND 1888

HOSSEINI BIBI AND OTHERS . . . . . PLAINTIFFS. *Feb.* 9, 10, 11, 15.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Mooshââ—Transfer of Possession—Gift—Practice—Inconsistent Issues disapproved—Forgery or undue Influence—Proof of undue Influence.

Case where it was held upon the evidence, overruling the judgment of the High Court, that a hibbanama which the plaint alleged to be a forgery was a genuine document, that it was executed by a purdanashin lady, who well knew what she was doing, and was bound thereby.

Where a Plaintiff sues alleging that a deed purporting to be executed by herself is a forgery, the Court ought not to admit the inconsistent issue whether it was executed under undue influence.

But where the issue of undue influence is rightly raised, the Court should consider (1), whether the transaction is a thing which a right-minded person could be expected to do; (2) whether it was improvident; (3) whether legal advice if wanting was necessary; (4) whether the transaction originated with the donor.

Where one of three Mahomedan co-sharers gives his share before division to either of the other two, such gift is not invalidated by the doctrine of Mooshââ.

Where a gift is public and authorizes the donee to take possession, which is in fact taken subsequently, the gift is not invalidated because the donor was not at the time in possession, and did not, therefore, at the time transfer it.

Kali Das Mullick v. *Kanhya Lal Pundit* (Law Rep. 11 Ind. Ap. 218) followed.

APPEAL by special leave from a decree of the High Court (Sept. 12, 1884), reversing a decree of the Subordinate Judge of *Gya* (Oct. 7, 1882), which had dismissed the suit.

The suit was instituted by *Shahzadi Bibi*, who died shortly afterwards, to recover possession of a one-sixth share of the estate of *Omda Bibi* (the deceased wife of the Appellant, *Mahomed Buksh Khan*), on the allegation that a hibbanama, or deed of gift, dated the 30th of May, 1881, and purporting to be executed by *Shah-*

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zâdi Bibi, in favour of *Omda Bibi's* infant children, was a forged document.

The Subordinate Judge found all the issues in the Appellants' favour, and dismissed the suit with costs. He found that the document was genuine and *bonâ fide*, executed and delivered with the consent of *Shahzadi Bibi*.

The High Court expressed themselves in this way: "On the whole, we are not satisfied that the deed was ever executed, or, even if it was, that *Shahzadi* understood its contents, and was a free agent at the time of the transaction."

Mayne, and *C. W. Arathoon*, for the Appellants, contended that on the evidence the decree of the Subordinate Judge was right, and that that of the High Court should be reversed.

Doyne, for the Respondents, contended that the onus of supporting the deed lay on the Appellants, who relied upon it, and that they had not discharged themselves: see *Gereshchunder Lahoree* v. *Mussumat Bhuggobutty Debia* (1). Even if the deed had been executed as alleged, it was not shewn that *Shahzadi Bibi* was a free agent or independently advised in the matter. On the contrary, she was shewn to have been under duress at the time. Beyond that, there were two legal objections to the validity of the deed, if properly executed; first, that *Shahzadi* was out of possession, and that consequently there had been no delivery and acceptance of the property, as is necessary to ensure the validity of a gift; secondly, the properties said to have been given were jointly owned by the donor and others, and the transaction violated the Mahomedan doctrine of Mooshââ. Reference was made to *Macnaghten's* Mahomedan Law, p. 50, and *Baillie*, p. 520; *Mullick Abdool Guffoor* v. *Muleka* (2); *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (3).

Mayne, replied, citing *Nobinchunder Bonnerjee* v. *Romeschunder Ghose* (4); *Kali Das Mullick* v. *Kanhya Lal Pundit* (5); *Macnaghten*, p. 51; *Baillie*, p. 522; Hedaya, book xxx., c. 1, vol. iii., p. 295; *Bai Kushal* v. *Lakhma Mana* (6); *Shaik Ibhram* v. *Shaik*

(1) 13 Moore's Ind. Ap. 431.
(2) Ind. L. R. 10 Calc. 1112.
(3) Law Rep. 2 Ind. Ap. 104.
(4) Ind. L. R. 14 Calc. 788.
(5) Law Rep. 11 Ind. Ap. 218.
(6) Ind. L. R. 7 Bomb. 452.

Suleman (1); *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (2); *Ameena Bibee* v. *Zeifa Bibee* (3).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

In this case the suit is brought to recover property contained in a hibbanama or deed of gift bearing date the 30th of May, 1881, and purporting to be executed by a widow lady named *Shahzadi Bibi*, who is dead. The persons to whom the hibbanama purports to convey the property are grandchildren of *Shahzadi*, the infant children of her daughter *Omda*, who had died a very short time before. The ground of action alleged by the plaint is that the hibbanama was a fabricated document, and that the alleged signature of *Shahzadi* was a forgery.

To understand the story and the position of the parties, it is necessary to give a short sketch of the pedigree of the family. *Shahzadi Bibi* was the daughter of *Sikundar Ali* and *Hesamut Bibi*; she had two brothers, *Nawab Ali* and *Mannujan*. *Nawab Ali* married a person of the name of *Hedayat*. *Shahzadi Bibi* herself married one *Nubi Buksh*. By him she had only two children, both daughters, *Omda Bibi* and *Hosseini Bibi*. *Omda Bibi* married *Mahomed Buksh Khan*, and by him had nine children, who are the infant Appellants. *Hosseini* married *Rubidad Khan*. *Mahomed Buksh Khan* was the son of *Jehangir Buksh Khan*. *Jehangir* married a person of the name of *Mahamdu*. *Mahamdu's* mother was *Hasan Bibi*. *Jehangir's* mother was *Rousham Bibi*, who also appears to have been the mother of *Nubi Buksh* and the sister of a lady called *Daem Bibi*, who was grandmother, or in the position of grandmother to *Shahzadi*.

It appears that from *Daem Bibi*, *Shahzadi* derived a property consisting of some twenty-two villages. In 1876, being then the wife of *Nubi Buksh*, but living apart from her husband, and apparently not being on good terms with him, she determined to make over this property to her daughter *Omda Bibi*. Her general mokhtar at that time was *Mahadeo Lal*. He seems to have

(1) Ind. L. R. 9 Bomb. 146. (2) Law Rep. 3 Ind. Ap. 105.
(3) 3 Suth. W. R. 37.

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remonstrated against the gift, and to have informed her husband, who also remonstrated. The lady, however, was firm in her purpose, and on the 9th of September, 1876, she executed a hibbanama granting this property to her daughter.

Now there is no question as to the genuineness of that document. It is executed by *Shahzadi*, by the pen of *Mahadeo Lal*, her general mokhtar; but she also authenticates it by writing upon it some words in Hindu "likha-se-Janoge," which are said to mean, "From what is written you will know." Among the attesting witnesses were *Jehangir Buksh Khan*, *Jewan Lal*, *Mahadeo Lal*, and *Dost Mahomed Khan*, who were examined in this suit in connection with the execution of the hibbanama of the 30th of May, 1881. It is not unimportant to observe that it appears by the attestation of the hibbanama of 1876 that *Dost Mahomed Khan* was the person who then identified *Shahzadi Bibi*, which confirms his statement in this case that he was in the habit of appearing before her.

After that deed was executed disputes arose between *Nubi Buksh Khan* and *Shahzadi*. It is said that there were suits, both civil and criminal. Ultimately an arrangement was made on the 22nd of December, 1876, by which a life-interest in the bulk of the property was secured to *Nubi Buksh*, and subject to that the hibbanama was confirmed. In order to equalise the shares of his two daughters, it appears that *Nubi Buksh*, after settling some property on two other children, who were not the children of *Shahzadi*, gave 10 annas of the rest of his property to *Hosseini* and 6 annas to *Omda*.

At the end of 1879, or the beginning of 1880, *Nubi Buksh* died. On his death fresh disputes arose in the family. They were ultimately settled by a deed of compromise bearing date the 14th of February, 1880. From that time until the present quarrel the parties appear to have lived on good terms. The result of the various transactions which have been referred to was to place the two daughters, *Omda Bibi* and *Hosseini Bibi*, on an equal footing as regards the property they derived from their parents. *Hesamut Bibi*, the mother of *Shahzadi*, a witness for the Respondents, says in her evidence, "both *Hosseini* and *Omda Bibi* were equally rich, one of them was not richer than the other."

Shahzadi Bibi lived at *Amas*. *Mahomed Buksh Khan* and *Omda* lived at *Khira*. In May, 1881, *Omda* fell sick, and she was moved to a place called *Nawadi*. *Shahzadi* went to *Nawadi* to be with her sick daughter. About four days after she went there *Omda* died. She died on the 14th of May, 1881. The body was taken to *Madarpore*, which was the family burying place, and all the immediate relatives, including *Shahzadi*, went there, and stayed at the house of *Hasan Bibi*, during the customary period of mourning, which is nominally forty days. On the death of *Omda*, by Mahomedan law, *Shahzadi* succeeded to a sixth of her estate. Her estate consisted of the twenty-two villages, which were conveyed to her by the deed of September, 1876; of other villages which she derived under the arrangement of 1876, and the compromise of 1880; of her dower, which amounted to one lac; and of a decree against *Jehangir Buksh Khan*, the amount of which is not stated, and which does not appear in their Lordships' opinion to be material for any purpose in the suit. If it had been material no doubt the parties would have taken care to have informed the Court what the amount of that decree was. On the 18th of June, 1881, the forty days of mourning ended with the ceremony called "chehloom." *Mahomed Buksh Khan* then went to *Khira*, and took *Shahzadi* with him. On the 22nd of June it appears that *Shahzadi* made a complaint before a magistrate that she was detained there against her will. The magistrate investigated the complaint, and seems to have thought that it was to a certain extent well founded, and he sent her home to *Amas* under the protection of two constables. She repeated that complaint on the 15th of July, and again on the 25th of that month; but on the 2nd of August the magistrate in charge came to the conclusion that there were no sufficient grounds for a prosecution, and that if she chose to go on she must act at her own risk. The matter then dropped.

On the 22nd of September, 1881, *Shahzadi* filed her plaint in this suit. The only ground of action alleged in the plaint is, that the hibbanama of the 30th of May, 1881, was a fabricated document, and that her alleged signature was a forgery. On the 12th of October, 1881, *Shahzadi* died. The proceedings were continued by her daughter *Hosseini Bibi*, and her father and mother

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Sikundar Ali and *Hesamut Bibi*. On the 16th of March, 1882, issues were settled. Amongst the issues was this: "2nd. Whether the hibbanama on behalf of *Shahzadi Bibi* is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence?" In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by Plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded. There was another issue which also was only admissible on that assumption, namely: "3rd. Whether in case the said hibbanama is proved to be genuine it is invalid on any ground according to Mahomedan law."

The questions therefore which had to be decided by the Court, and which have now to be considered by their Lordships, are three:—First, was the deed really executed by *Shahzadi*? Secondly, if so, are there any circumstances which go to prove that it ought not to be held binding upon her? and thirdly, is the gift valid under Mahomedan law?

Now, to take the first question: Was the deed really executed by *Shahzadi*? It purports to be executed by her by the pen of *Mahadeo Lal*, who was no doubt for a considerable time her general mokhtar. It purports to bear as her signature the Hindu words which admittedly she wrote on the deed of the 9th of September, 1876, by way of authenticating that document. Her execution is attested by no less than twenty-one witnesses, nine of whom, as well as the writer, have been examined in support of the deed. She was a purdanashin lady. There were women inside, and they of course, according to the evidence could have seen her execute the deed. Three swear they saw the execution. Two whose presence is deposed to by several witnesses swear that they were not even in *Madavpore*. Their evidence however is not believed by either Court. Of the male witnesses, three, and three only, according to the evidence, could have seen the deed executed—*Nawab Ali*, who died before the hearing, *Mannujan*, and *Dost Mahomed*. The others attest the deed on *Shahzadi's* admission. In the afternoon of the day on which the deed is alleged to have been executed, the sub-registrar came over and

took her acknowledgment. The sub-registrar is stated by the Subordinate Judge to be "a respectable and learned person." He deposes that he knew *Shahzadi's* voice, and that she acknowledged the deed before him.

The Subordinate Judge, who had the advantage of seeing the witnesses, unhesitatingly came to the conclusion that the deed was genuine. He relied principally on the evidence of *Mannujan*, *Mahadeo Lal*, and *Manwar Ali*, the sub-registrar. The High Court came to a different conclusion. They say: "We think that a large amount of suspicion attaches to this evidence, and we are not satisfied that the deed was really executed by *Shahzadi*." Their Lordships cannot consider the judgment of the High Court satisfactory. The learned Judges suspect everybody; they suspect everything. Every one who took an intelligent part in the transaction, the dead as well as the living—*Shahzadi's* relations as well as her son-in-law's dependents; even the sub-registrar of the district who attended only in the discharge of his official duties—one and all are alike involved in general and indiscriminate suspicion.

The learned Judges say that they cannot but regard *Jehangir Buksh Khan* as the prime mover in the matter; and they add, "We cannot help suspecting that this witness had a good deal more to do with the preparation, execution, and registration of this deed than he has chosen to tell the Court." In their Lordships' opinion this witness seems to have answered fairly every question that was put to him, and if his evidence be true, and there is nothing to contradict it, his connection with the transaction was of the slightest. According to his statement, he was summoned by a letter from *Shahzadi* to come over and witness the execution of the deed. He came over in the early morning; he spoke to *Shahzadi*, and she spoke to him. She acknowledged that she had executed the deed, and he attested it. Then he mounted his horse and rode away, and that appears to be the only connection he had with the transaction, except that he is the father of *Mahomed Buksh Khan*, and *Mahadeo Lal* was his general mokhtar.

The learned Judges also mention as a matter of suspicion that no independent person seems to have been called in to attest that

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deed, and that no independent person has deposed in favour of its execution. The latter conclusion is not quite accurate. The sub-registrar, whether he is to be believed or not, was unquestionably an independent person, and had no connection whatever with either side. It is somewhat difficult to understand what is meant by the objection that no independent person was called in to attest the deed. It has not been suggested that any member of the family or any person who would naturally have been present if the deed were genuine was absent on the occasion when it is said to have been executed. Every member of the family with whom we are acquainted, with the exception of *Hosseini Bibi* and her husband, was present and attested the deed. It would not have been very natural that *Hosseini* or her husband should have been called in to attest a deed which disappointed their hopes or at any rate defeated their chance of succession. But, in point of fact, according to the statement of *Rubidad Khan*, *Hosseini Bibi* was incapacitated by illness from going to *Madarpore*. It is stated that she did not go there until the chehloom. *Rubidad Khan* also states that he was not there; that he was present at the burial, but that from the time of the burial till the chehloom he did not go to *Madarpore*. It is difficult to see what advantage would have been gained by summoning an independent person to attest the deed. The lady was a purdanashin lady. A stranger would not have been admitted to her presence. The attestation of a stranger who could not have seen her write and who could not have known her voice would have carried the matter very little further.

Then there are three minor matters of suspicion on which the learned Judges comment. They say the draft of the deed was not produced. It is difficult to see what light that draft could have thrown upon the transaction. At any rate, it was not called for. It is said that two letters which are mentioned in the evidence as having been sent by *Shahzadi* to summon *Mahadeo Lal* and *Jehangir Buksh Khan* were also not produced. They were not called for either. The Plaintiffs seem to have been satisfied with a statement of what was contained in those letters by the recipient of the one and the writer of the other. Of course, if the deed was forged, notwithstanding the publicity

connected with it, there could have been no difficulty in forging *Shahzadi's* signature to a letter.

The learned Judges also observe that it is a remarkable circumstance that none of the female witnesses who were behind the purda make any direct statement on the point of *Shahzadi's* writing the words in Hindu. They merely state, say the Judges, in general terms that *Shahzadi* executed the deed. That observation also does not appear to be quite accurate. The three ladies who were behind the purda, and who gave evidence for the Defendants, *Malik Jehan Bibi*, *Hasan*, and *Mahamdu*, state that the deed was executed by *Shahzadi* in their presence. One—and one only—of those ladies was cross-examined upon the point, and her statement in cross-examination is very positive. That is *Mahamdu*. She says, "The females had witnessed it in my presence. First the females witnessed it and then the males. The signature of *Shahzadi Bibi* was put in my presence. *Shahzadi Bibi* ordered *Mahadeo Lal* to sign for her, and then he signed for her. After that she wrote below it two or four letters in Hindu which she knew." *Mahamdu* seems to have been the first witness who was examined on behalf of the Defendants—certainly the first or second—the other two were not cross-examined upon the point. Their cross-examination appears to have been entirely directed to irrelevant objects.

"Another very suspicious circumstance" in the opinion of the learned Judges is this, that the Hindu words written, or said to have been written, on the deed by *Shahzadi Bibi* with the object of authenticating it, are identically the same, letter for letter, as those which are found on the hibbanama of 1876. They add, "The fact of these Hindu words corresponding so exactly with those on the deed of 1876, which was apparently not in *Shahzadi's* possession or produced before her at the time of execution, does certainly raise the suspicion that they were not really written by her but had been copied by some other person from the former deed."

Now it is material to mention a circumstance which in that passage appears to have been overlooked, namely, that those words occur not once only, but twice. They were written in the morning, and they were written again in the evening when the

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sub-registrar came over to take *Shahzadi's* acknowledgment. The sub-registrar states that he knew *Shahzadi's* voice; he states that he read the deed to her. Then he goes on to say—"I asked whether she had executed the deed of gift or not? She said that she had executed it, and it might be registered. On the back of the deed of gift I, at that time, wrote out the registration with my own hand. After that I asked the Mussumat who knew her. The Mussumat said that *Nawab Ali Khan* and *Mannujan Khan*, who are her full brothers, knew her. I then asked both of them, and they said that they knew her. After that I wrote out in the deed the identification by both. After that I pointed out to *Nawab Ali Khan* the place where he should sign for *Shahzadi Bibi*, and also the place where they should affix their own signatures. After that *Mahadeo Lal*, mokhtar, signed for *Shahzadi Bibi* by his own pen, and she also wrote 'You will know from what is written.' *Nawab Ali Khan* and *Mannujan Khan* affixed their signatures. After the signature affixed by *Mahadeo Lal*, *Shahzadi Bibi* affixed her signature. I did not make any objection to what *Shahzadi Bibi* wrote because on other occasions also when I had taken her admission and made registration she used to write so much, and I knew that she knew to write so much." Therefore whether the first signature—that is the Hindu words—be genuine or not, it is quite plain that these same words were added again in the evening when the sub-registrar went over to take *Shahzadi's* acknowledgment. If the learned Judges of the High Court are right, who was the forger? None of the ladies could write; that is clear. *Jehan Lal*, the writer of the deed, was not present at the time; he only came up just as the sub-registrar was going away. The only males who, according to the evidence, saw the lady on that occasion were her brother *Nawab Ali*, and *Mannujan*. *Mannujan* cannot write. So that the words must either have been written by *Nawab Ali* or by the lady herself. There is not the slightest ground to suspect *Nawab Ali* of any fraud or forgery, and therefore it appears to be the necessary conclusion that the words must have been written by the lady herself.

When the cloud of suspicion in which the High Court has enveloped the transaction has been cleared away, the evidence

in favour of the genuineness of the deed is absolutely overwhelming. There is no evidence whatever on the other side.

There is nothing but *Shahzadi's* assertion that she did not execute the deed—an assertion in which no doubt she persisted from the time she complained to the Magistrate down to the time of her death.

Their Lordships think that the Subordinate Judge was right in relying on the evidence of the sub-registrar and of *Mahadeo Lal* the mokhtar, with whose character the Subordinate Judge also seems to have been acquainted. He says he "holds a diploma, and is a respectable person in his community and the Court has never seen any act of his by which it can suspect him." *Mannujan* broke down on cross-examination. The Subordinate Judge attributes his confusion entirely to illness, and apparently the civil surgeon and assistant civil surgeon of the district certified to that effect. Be that as it may, their Lordships think that it would not be safe to rely on *Mannujan's* evidence, except so far as it is corroborated by other witnesses, and they consider that more reliance is to be placed on the fact that the signature of *Shahzadi* was identified by her brother *Nawab Ali*, who seems to have been in a superior position to *Mannujan*. He was a person of education, and appears to have been trusted by other members of the family. The mother, *Hesamut*, employed him to receive for her the allowance which her husband was condemned to pay, and she says "I was on good terms with *Nawab Khan*. There was no misunderstanding between us at any time. I had confidence in him." Certainly if this deed was a forgery he must have known all about it, but what possible reason can there be to suspect him of having been a party to such a gross fraud? In their Lordships' opinion there is none. It is not necessary to go further into the evidence. It is sufficient to say that their Lordships have come to the same conclusion as the Subordinate Judge, that the deed was really executed by *Shahzadi*.

Then comes the question, was the deed executed under such circumstances that it ought not to be allowed to stand? Duress and coercion may be laid out of consideration. The witnesses who spoke to anything of that kind were discredited by both Courts. But there remains the more subtle form of undue

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influence. Their Lordships desire not to say a word which could interfere with the settled principles on which the Court acts in considering the deeds of purdanashin ladies or could tend to lessen the protection which it is the duty of the Court to throw around those who are unable to protect themselves. They do not forget that this lady was a purdanashin lady. They do not forget that at the time of the execution of the deed she was living in more than ordinary seclusion; that she was in very deep distress; and that she was surrounded by the members of that branch of the family to which the objects of her bounty more immediately belonged. But bearing all these things in mind, and reviewing the whole evidence, they come to the conclusion that the lady knew perfectly well what she was doing, and that in every sense the act was her own act.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and, as a general rule, the same questions arise. The first and practically perhaps the most important question is, was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be expected to do? Can there be any doubt about the answer to that question? *Shahzadi* made a settlement on *Omda*. *Omda* was her favourite daughter, and had a large family. By an untoward and unlooked-for event a share of *Omda's* fortune which was principally derived from that settlement devolves on *Shahzadi*. To her the acquisition of property by her daughter's untimely death seems to have been an odious and repulsive thing, and she determines as soon as possible to give it back to her daughter's orphan children. Was there anything unnatural in that? It appears to their Lordships to have been a most natural act, and one which a right-minded person would be disposed to do.

Then there comes the question—was it an improvident act? That is to say, does it shew so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? Upon that Mr. *Doyne* made some forcible observations. He said that by the earlier hibbanama this lady had stripped herself of all that she possessed;

that she had reduced herself to penury; that then by accident a portion of the property came back to her, and he insisted that it was an improvident act on her part to divest herself immediately of that pittance when she had nothing else to live upon. Now that case is not made by the evidence. There does not appear from first to last any complaint on the part of this lady that she was reduced to poverty. Nor was her position that of a pauper. She had a house of her own; she had servants; she comes in a dooli; so far as the evidence goes she had enough for her wants, and her wants as a widow were probably very small. It does not therefore appear to have been a transaction so improvident as to shew that it was not her own act.

Then was it a matter requiring a legal advisor? What could have been simpler than what she desired to do? She was not apportioning her property among the members of her family; she was not determining how much she could spare, but when property came to her by this sad accident, she says, "I will have none of it." What could a legal adviser have told her? If he had advised her to wait till she left the house where *Mahomed Khan* was; if he had told her to place herself between two fires, and allow *Rubidad Khan* on the one hand and *Mahomed* on the other to urge the claims of their respective children she would not have benefited much by the advice.

Lastly, did the intention of making the gift originate with *Shahzadi?* Upon that there is positive evidence, and there is negative evidence. The positive evidence is very strong, but the negative evidence appears to be stronger still. *Mahadeo Lal*, who was unquestionably her general mokhtar as long as she had any property to deal with, and who was employed by her to prepare this deed, says:—"I went to *Shahzadi Bibi* at the deori for condolement, and then *Shahzadi Bibi* told me this:—'I at first given my property in writing to my daughter *Omda Bibi*, but now owing to her death one-sixth share devolves upon me. As I have no hope of living long I do not like to take the estate of *Omda Bibi*. I wish to give that share to her sons and daughter. Please write out a draft of hibbanama.'" In cross-examination he says even more positively that it was her own doing, and that he prepared the hibbanama by her own direction.

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Then *Mahamdu* says this in cross-examination:—"*Shahzadi Bibi* herself commenced to talk about the hibba. I do not recollect how many days after going to *Madarpore* conversation took place about the hibba. But she had spoken of it after ten or fifteen days. *Shahzadi Bibi* first spoke about the hibba, to me and other females. *Shahzadi Bibi* said: 'I had already given in writing during the lifetime of my daughter. Now she is dead, and a share has devolved upon me. How can I snatch it from grandsons and granddaughters? The children have become motherless. I will again give them in writing.' We told her 'It is your pleasure. You have got a share; you may do with it whatever you like.'" There is not a scrap of evidence to shew that the idea was suggested to her by *Mahomed Buksh Khan* or any one else. And it is a circumstance not to be overlooked that *Mahomed Buksh Khan* did not obtain any benefit personally for himself.

But the negative evidence is still stronger. No case of undue influence was set up by *Shahzadi*. The plaint is based on forgery and forgery alone. The question of undue influence was introduced for the first time in the issues; but although it was introduced then, it was not accepted by the family. We find that on the application for registration, which took place a few days after the issues were settled—the date is the 23rd of March, 1882—the sole averment still is that the deed was a forgery. It is somewhat singular that, although the ladies who were examined as witnesses for the Defendants were the first witnesses who were examined, and they stated that *Shahzadi* executed the deed of her own free will and without undue influence, the ladies on the other side who came forward a month afterwards to give evidence preferred to state what both Courts have held to be absolutely untrue, namely, that they were not present at *Madarpore* at all, they preferred stating that to admitting that they were present, and trying to make out a case of undue influence, which they must have known then would have been fatal to the deed if it could be proved.

Their Lordships therefore hold that the suggestion of undue influence is not proved.

There remains the question whether the gift was good by

Mahomedan law. On that two points were made. In the first place it was said to be open to objection on the Mahomedan doctrine of Mooshââ, which appears to be this: that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion. But it appears to be settled by Mahomedan law that if there are two sharers of property, one may give his share to the other before division. That seems to be established by a passage in *Macnaghten's* Precedents, Case XIII., which was adopted in the case to which Mr. *Mayne* referred, of *Ameena Bibee* v. *Zeifa Bibee* (1).

Now, if one of two sharers may give his share to the other, supposing there are three sharers, what is there to prevent one of the three giving his share to either of the other two? Mr. *Doyne* was asked what confusion that would introduce. Mr. *Doyne* took refuge in the doctrine itself, which he said was a very refined doctrine. To extend it to this case would be a refinement on a refinement, amounting in their Lordships' opinion almost to a *reductio ad absurdum.*

The other point was that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pundit* (2). There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibbanama itself authorizes the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold under these circumstances that there can be no objection to the gift on the ground that *Shahzadi* had not possession, and that she herself did not give possession at the time. That view seems to be supported by a passage in *Macnaghten's* Precedents, Case X., where the question was: If property left by two brothers devolve on

(1) 3 Suth. W. R. 37. (2) Law Rep. 11 Ind. Ap. 218.

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the widows, "Are the widows entitled to dispose of their late husband's property by gift, and if they have a right to do so, is the deed of gift executed by them in favour of one of the husband's heirs available in law?" Then it is stated that, "Although the widows at the time of the execution of the deed of gift were not seised of the property, yet if agreeably to their desire, the donee, in pursuance of a judicial decree, became subsequently seised thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient to invalidate it."

Their Lordships, therefore, are of opinion that the appeal ought to be allowed, and that the decree of the High Court ought to be reversed and the decree of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The Respondents will pay the costs of the appeal, and the costs in the High Court. The deposit of £300, which was made by the Appellants, will be returned.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondents: *Barrow & Rogers.*

RADHAMADHUB HOLDAR AND ANOTHER . PLAINTIFFS;

AND

MONOHUR MOOKERJI . . . . . DEFENDANT.

J. C.* 1888 March 14, 15.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Purchase pendente Lite—Res judicata.

Where a zemindar grants a putni and subsequently mortgages the zemindary interest to the putnidar, who obtains a decree against the zemindar, and at a sale in execution thereof buys the zemindary interest subject to the mortgage:—

Held, that a purchaser from the zemindar *pendente lite* is bound by such sale; and that a rent suit by such purchaser having been dismissed his subsequent redemption suit was barred as *res judicata*.

APPEAL from a decree of the High Court (April 27, 1885), reversing a decree of the Subordinate Judge of zillah *Hooghly* (April 2, 1884).

The question in the appeal was as to the appellant's right under the circumstances stated in the judgment of their Lordships to redeem a mortgage executed by *Srimati Matangini Debi* in favour of *Raj Krishna Mookerji* (the father of the Respondent), in May, 1869, and to recover possession of a three annas four gundahs share of a zemindary called lot *Shankhali*, which was the subject of the mortgage.

Mayne, and *C. W. Arathoon*, for the Appellants, contended that the suit was not barred as being *res judicata*; and that the Plaintiff having purchased under an attachment which was complete prior to the Respondent's suit, the right of the attaching creditor passed to him. The doctrine of *lis pendens* did not apply. Reference was made to *Rajah Run Bahadoor Singh* v. *Mussamut Lachoo Koer* (1).

Cowie, Q.C., and *Doyne*, for the Respondents, were not called upon.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN and SIR BARNES PEACOCK.

(1) Law Rep. 12 Ind. Ap. 23.

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RADHAMADHUB HOLDAR v. MONOHUR MOOKERJI.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships think that this case is a very clear and simple one when once the numerous proceedings and dates are ascertained.

The material circumstances are these. *Matangini* was the proprietor of the estate in question, and she granted the estate in putni to one *Mookerji*, the father of the present Defendant. No difference is made by the change of title; and it may be considered that the putnidar has remained one and the same person. After that *Matangini* mortgaged her proprietary interest to *Mookerji*. *Mookerji's* position therefore was this: that he was putnidar of the estate with a charge upon what we should call the reversion of the proprietary interest. Under those circumstances a creditor of *Matangini* sues for his debt, gets a decree, attaches the property, and sells it in the month of April, 1872; and under that sale the Plaintiff *Radhamadhub* became the purchaser. What did he get by his purchase? He got *Matangini's* proprietary right, subject to the putni, and subject to the charge. But in the meantime *Mookerji* had been enforcing his charge against *Matangini*, and he got a decree, and in the month of May, 1872, about a month after the sale to the Plaintiff, a sale took place under his decree, and he himself purchased at that sale. Now if *Matangini* herself had remained the owner of the proprietary interest she would be clearly excluded by that sale from all interest in the property. It is equally clear that the Plaintiff must be excluded, he having purchased only the right, title and interest of *Matangini*, unless he can shew that after the purchase in April, 1872, he was not bound by the proceedings in *Mookerji's* suit. That very question has been raised and decided between the parties. After the two sales *Radhamadhub*, as claiming to be proprietor, sued *Mookerji* as putnidar for the rent due upon the putni, and his claim was that he stood in the shoes of *Matangini*. On the other hand *Mookerji* defended himself by saying:—"It is not you, but I, who stand in the shoes of *Matangini*, and therefore you have no claim against me;" and the decision was that, inasmuch as *Mookerji's* suit to enforce his charge was pending at the time of the sale to *Radhamadhub*,

Radhamadhub was bound by the proceedings against *Matangini*. On that ground the rent suit was decided against *Radhamadhub*. *Radhamadhub* now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally: Who is the true representative of *Matangini*? Therefore their Lordships conceive that the matter was expressly decided by the High Court in the rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came.

Their Lordships are therefore of opinion that the appeal must be dismissed, and that the Appellants must pay the costs; and they will humbly advise Her Majesty to that effect.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondent: *Wrentmore & Swinhoe.*

BHAGBUT PERSHAD AND OTHERS . . . DEFENDANTS;

AND

MUSSUMAT GIRJA KOER AND OTHERS . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Mitakshara—Sale in execution against the Father—Suit by Sons—Debts for immoral Purposes—Onus Probandi.

Where ancestral estate governed by the Mitakshara has been sold in execution against a Hindu father upon a bond debt contracted by him, the *onus* is upon the sons when seeking to set aside such sale to prove that the debt was contracted for an immoral purpose. It is unnecessary for the creditors to shew that there had been a proper inquiry, or that the money had been borrowed in a case of necessity.

APPEAL from a decree of the High Court (June 21, 1883), affirming a decree of the Subordinate Judge of *Patna* (June 8, 1881).

The suit in which this appeal was made was brought against

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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three Hindu brothers and the purchaser at an execution sale of their ancestral estate. The Plaintiffs were their three wives and minor sons. The decrees in execution of which the sales had been ordered had been obtained against the brothers on bonds executed by them. The object of the suit was to set aside the sales on the ground that the estate was ancestral, and that the debts had been incurred by the brothers during the minority of their sons for immoral and licentious purposes.

Another suit was tried at the same time instituted by the same Plaintiffs against other purchasers in respect of other portions of the same ancestral estate. They were tried together.

The prayer of the plaint in this case was to recover possession of the whole of such portion of mouzah *Bazidpore Dhanki* as had belonged to the joint family, or failing this of so much thereof as would fall to the Plaintiffs' share on a partition.

The Subordinate Judge held that the property was ancestral; that the Plaintiffs had not proved that the borrowed moneys were specially applied to immoral purposes; that the Defendants had not proved the existence of justifying necessity for the loan, or that they had inquired into the necessity "to such an extent as a cautious man does at the time of making any transaction." He rejected the claim of certain of the Plaintiffs as not having been born at the time the debts were incurred. He allowed the claims of the others, as they were no parties to the suits in which the auction sale had taken place, and therefore could not have protected their rights.

The High Court agreed in these findings, and held that as the Plaintiffs distinctly asserted at the time of sale that they were not bound by the debts, the purchasers bought "with knowledge of the Plaintiffs' claim and subject to the result of this suit."

C. W. Arathoon, for the Appellants, contended that on the evidence the loans taken by the three brothers were taken to satisfy ancestral debts as well as legitimate family, religious, and legal purposes. As the debts have been concurrently found not to have been for immoral purposes the sons were liable to pay them to the extent of their interest in the ancestral estate.

That of itself was an answer to the suit. The purchasers were not bound to go behind the decree under which they bought. Nor were they bound to shew that there was any necessity for the loans, or that the creditors had inquired into such necessity before making such loans. Reference was made to *Mussumat Nanomi Babuasin* v. *Modun Mohun and Others* (1); *Girdharee Lal* v. *Kantoo Lal* (2); *Suraj Bunsi Koer* v. *Sheo Proshad* [illegible] *Massumat Kooldeep Kooer* v. *Runjeet Singh* (4); *Kas* [illegible] *Appa* (5).

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The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a decree of the High Court in a suit brought by the widows of *Babu Jhaller Singh*, *Babu Pertab Narain Singh*, and *Babu Roghuberdyal Singh*, on behalf of themselves and the infant children of their respective husbands, to recover possession of property which had been purchased by the first Defendant, *Babu Punnu Singh*, under certain writs of execution against the three husbands. The property which was the subject of this suit, namely, a five annas four pies share of *Bazidpore Dhanki*, was ancestral property governed by the Mitakshara. The husbands by four bonds had charged the five annas four pies share with certain debts. One of those bonds was given by one of the husbands alone, namely, *Jhaller*. The decree under which the first sale in execution took place was on a judgment upon a bond given by the three husbands to secure a certain sum for money lent to them and by which they charged by way of mortgage, as security for the amount lent, the five annas four pies share. They were sued, not only to recover the money out of their general assets, but in the first place to have it realised out of the five annas four pies share. The decree was that the money should be recovered out of the property charged, and the

(1) Law Rep. 13 Ind. Ap. 1.
(2) Law Rep. 1 Ind. Ap. 321.
(3) Law Rep. 6 Ind. Ap. 88.
(4) 24 Suth. W. R. 231.
(5) Ind. Law Rep. 5 Bomb. 628.

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five annas four pies share was attached in execution of the decree, and was sold in execution. The sale was confirmed by the Court, and the confirmation recites that the action had been brought for the recovery of a certain amount, and "as the right and interest of *Babu Jhaller Singh*, and *Babu Pertab Narain Singh*, and *Roghuburdyal Singh*, judgment debtors, in the under-mentioned land, or immoveable property, were sold on the 6th of October, 1879, in execution of this decree through the bailiff of the Court of the Judge of *Patna*; and as seven days have elapsed and no objection is filed, it is ordered that the said auction sale be confirmed, and the said sale is confirmed by this order." Then at the foot of the certificate of confirmation the property is stated to be the five annas four pies share of the mouzah *Bazidpore Dhanki*, so that there can be no doubt that by the bond under which the sale took place that property was charged; the debt was decreed to be recovered out of the property; the property was attached; the property was sold, and the sale was confirmed as to the property itself. Therefore it was not a mere sale of the right, title, and interest of the debtors. It was the sale of the property being the right, title, and interest of the debtors.

The suit was brought by the widows on behalf of themselves and the children to set aside the sale entirely; and they also prayed that possession might be awarded in respect of the whole five annas four pies share; and secondly:—"In case the purchase of Defendant No. 1,"—that is the purchase of *Punnu*—"in respect of the right and interest of Defendants Nos. 3 to 5 (that is the three husbands), be held valid, then your Petitioners might be put in possession of their legal share by partition."

The case was tried by the Subordinate Judge, and he gave a decree in favour of the Plaintiffs for the shares to which he considered the claimants would be entitled if a partition had been made. His judgment is recorded, and his order is: "That the case of the Plaintiffs be decided with this detail; that the claim of five of the Plaintiffs"—naming them—"be dismissed with costs." Those were five of the children who were not in existence when the bonds were executed. There is no appeal on the part of those children with regard to the dismissal of their claim. Then upon the claim of the widows and the other

children he ordered that the property "be divided into fifteen sahams," which means fifteen shares,—"of which twelve sahams be declared to be the property of the Plaintiffs, and three of *Jhaller*, *Pertab*, and *Roghubur*; that each of the Plaintiffs mentioned above do get possession of one saham, and the remaining shares, that is to say, the shares of the three husbands, remain in the possession of the Defendants."

Upon that, there was an appeal to the High Court, and the Court gave their judgment on the 21st of June, 1883. For their reasons they referred to a judgment they had given in another suit. The effect of the judgment was, that although the Defendants had failed to prove that the loans in respect of which the bonds were executed were required for family necessities, still the Plaintiffs had equally failed to establish that they were "applied to immoral purposes." That the lenders did not make any proper inquiry which a prudent lender would make to satisfy himself as to the necessity of the loans. As to the evidence of immoral and extravagant conduct of the husbands the High Court said, "although the witnesses examined by the Plaintiffs give a somewhat exaggerated account of it, yet we are on the whole satisfied that these persons were leading a life of debauchery and sensuality; and if the lenders had made proper inquiry they would have found that the necessities of the loan arose from their improper and immoral way of life. The Lower Court seems also to be of this opinion. The Subordinate Judge in one portion of his judgment says: 'The mere bad conduct of *Jhaller*, *Chiler*, and *Roghubur*, is not sufficient to resume the property.' But the Lower Court thinks that the evidence adduced is not sufficient to establish that the amounts borrowed under the aforesaid bonds were actually applied to immoral purposes. In this opinion we also concur." It therefore appears that the High Court thought that although the bonds were not proved to have been given for moneys advanced for improper purposes, still the lenders of the money who had sued and recovered their judgments had not made proper inquiries to ascertain whether there was an actual necessity for the loans. But it must be borne in mind that this was not a case of a joint family consisting of brothers but it was one consisting of fathers and children; and

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it has been held that sons are liable to pay the debts of their fathers, unless incurred for immoral or illegal purposes.

That principle was laid down by the Judicial Committee in the case of *Suraj Bunsi Koer* v. *Sheo Proshad Sing* (1), where a ruling of Chief Justice *Westropp* was referred to with approbation, in which he said: "Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grandfather." *Colebrooke's* Dig. Book 1, cap. 1, par. 167, and *Girdhari Lal* v. *Kantoo Lal* (2), were cited as authorities for the proposition, and in a subsequent part of their Lordships' judgment the decision in the case of *Kantoo Lal* is summed up in the words following: "This case, then, which is a decision of this tribunal, is undoubtedly an authority for these propositions: 1st. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

Now, although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to shew that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the children to shew that the debt was contracted for an immoral or illegal purpose. If it was necessary to shew that the debt was so contracted the Plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, it was necessary for the Plaintiffs to shew that the debt was contracted for an illegal or immoral purpose.

(1) Law Rep. 6 Ind. Ap. 104. (2) Law Rep. 1 Ind. Ap. 321.

In the case of *Mussumat Nanomi Babuasin* v. *Modun Mohun and others* (1), the principle laid down in the previous case was adopted; and in the judgment of their Lordships (2) it is said:— "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority." It appears therefore, from the decisions, that in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to shew that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity.

Under these circumstances, their Lordships think that the judgment of the High Court was an erroneous one, and they will humbly advise Her Majesty that that judgment and the judgment of the subordinate Court in so far as it was adverse to the Appellants should be reversed, and that the suit be dismissed with costs in both those Courts. The Respondents will pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

(1) Law Rep. 13 Ind. Ap. 1. (2) At page 17.

J. C.* 1888 March 15, 16.

AMANAT BIBI AND OTHERS . . . . . DEFENDANTS;

AND

IMDAD HUSAIN . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Res Judicata—Act X. of 1877, *s.* 13—*Act XII. of* 1879, *s.* 6—*Act VIII. of* 1859, *s.* 7.

A suit by the Respondent in 1866 to establish sub-proprietary right as against the talukdar having been dismissed, and a later suit to recover the same property from the talukdar under the terms of Circular No. 106, of 1869, *i.e.*, on repaying to the talukdar the arrears of revenue which he had paid to the Government, having also been dismissed:—

Held, that, a third suit to redeem the same property under a mortgage deed was not barred as *res judicata*, under sect. 13 of Act X. of 1877 as amended by sect. 6 of Act XII. of 1879. Nor did the claim to redeem under the deed arise out of the former cause of action within the meaning of sect. 7 of Act VIII. of 1859. And the Plaintiff not then being aware of his right, it could not be regarded as a "portion of his claim" within the said section.

APPEAL from a decree of the Judicial Commissioner (August 1, 1882) reversing a decree of the District Judge of *Fyzabad* (Oct. 27, 1881) and remanding the Respondent's suit, which had been dismissed, for a decision on its merits; and from a decree of the Judicial Commissioner (Sept. 26, 1884) made after the remand affirming a decree of the District Judge (April 14, 1883) in favour of the Respondent.

In his plaint the Respondent alleged his title to the property in dispute and its settlement with *Malik Tafazzul Husain*, of whom the Defendant *Hidayat Husain* was brother and successor, that he, the Respondent, had in ignorance of facts preferred a claim for such settlement, which had been rejected.

He referred to the proceedings of 1868 and 1869 mentioned in the judgment of their Lordships as "execution proceedings under Circular No. 4, of 1867."

He alleged that he first learned from the proceedings in a later

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

suit, that the property now in suit had been mortgaged by his father, with power to redeem the same, that according to the terms of an agreement of the 4 Ramzan 1270 (June 1, 1854), which he produced and filed, it was clear that the mortgage money had been satisfied, and he prayed for accounts and that he might be allowed to redeem, paying what was due.

On the 27th of October, 1881, the District Judge gave his decision dismissing the Respondent's suit, holding that the findings of the Settlement Courts were a bar to this suit; he added—

"Plaintiff's vakil has contended that the proceedings in which these findings are recorded was a miscellaneous proceeding under the hard case rules, Circular 4 of 1867, but I find they were proceedings taken on a remand for further inquiry, ordered on a successful application to the Financial Commissioner for review of his own order in regular appeal, and are as much regular proceedings as any other part of the case. In the redemption case the Plaintiff says there was no regular hearing. It was, however, a regular suit, and although the Court did not consider it necessary to summon the Defendant, it disposed of the case quite regularly."

He accordingly dismissed the Respondent's suit.

On the 1st of August, 1882, the Judicial Commissioner of *Oudh* set aside the judgment of the District Judge. The material part of his judgment is the following:—

"I am of opinion that the suit is not barred as *res judicata*. In the original case the Plaintiff sued for under-proprietary right. He now sues as a mortgagor, he is not litigating under the same title that he was in the under-proprietary suit." He accordingly ordered that the case should "be brought again on to the file of the District Judge who will decide the suit on its merits."

The issues subsequently recorded raised the two questions, whether the suit was barred as *res judicata*, and whether the property had been mortgaged in 1854.

On the 14th of April, 1883, the District Judge pronounced his amended decree, whereby he decreed in favour of the Respondent, for redemption of the property by payment of Rs.2001.

In his judgment the District Judge said as to the first point:—

"Having read the various decisions which have been given

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between the parties, I should not hold this claim barred as '*res judicata*,' but I need not assign my reasons, because I am of opinion that this Court cannot admit the plea of '*res judicata*' in the face of the ruling of the Judicial Commissioner in his order of remand of the 1st of August, 1882."

On the second point he said :—

"It cannot be said now with any show of reason that the talukdar holds under any title other than that of a mortgagee, and it is clear that the talukdar's connection commenced only in the middle of 1261 F." (1854).

On appeal the Judicial Commissioner said with reference to the issue of *res judicata*, after reviewing the previous litigation: "This procedure was in my opinion altogether defective even on the materials then before the Courts, but it is obvious that the case then before those Courts was of a wholly different character from the present suit. *That* was a claim based on orders of the Government. *This* relies on a private bargain of the parties."

On the second point, he summed up his examination of the evidence as follows: "On the whole, I think that this agreement (1st of June, 1854) must be accepted as genuine, and taking it with the other evidence for the Plaintiff, it seems to me that his contention that the estate was mortgaged to the malik in 1261 F. (1854), and not before, and that the mortgage was redeemable as set forth by the terms of the agreement, must be held to be established."

Graham, Q.C., and *Branson*, for the Appellants, contended that the proceedings in the Settlement Courts barred the present suit. Reference was made to *Thakur Shankar Buksh* v. *Dya Shankar* (1); *Phosphate Sewage Company* v. *Molleson* (2); *Hunter* v. *Stewart* (3); Act VIII. of 1859, ss. 13 and 6; *Toponidee Dhirj Gir Gosain* v. *Sreeputty Sahance* (4); *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (5); Act X. of 1887, s. 623. [SIR RICHARD COUCH referred to *The Shivagunga Case* (6); *Soorjomonee Dayee* v. *Suddanund Mohapatter* (7).]

(1) *Ante*, p. 66.
(2) 4 App. Cas. 801.
(3) 4 De G. F. & J. 168.
(4) Ind. L. R. 5 Calc. 832.
(5) 8 Suth. W. R. (P.C.) 12.
(6) 11 Moore's Ind. Ap. Ca. 73.
(7) Law Rep. Ind. Ap. Supp. Vol. 212; S. C. 12 Beng. L. R. 304.

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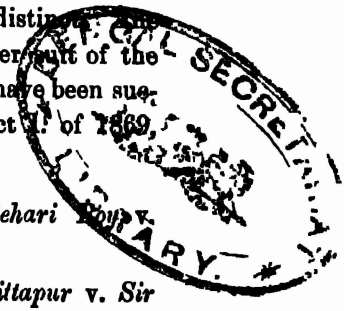
Mayne, for the Respondent, contended that there were concurrent findings of fact by both Courts that the property was held all along on the terms of a redeemable mortgage. The cause of action in this suit being on a mortgage was totally different from that on which the former proceedings were based. The former cause of action was to give effect to an alleged right to sub-proprietary settlement. The Plaintiff was not bound to include both reliefs in the former suit. They were quite distinct, and Plaintiff was in ignorance at the time of the former suit of the claim now made; and besides, this suit could not have been successfully maintained till after the passing of Act II. of 1869, sect. 6.



Graham, Q.C., replied, referring to *Krishna Behari Roy* v. *Brojeswari Chowdhranee* (1).

[SIR BARNES PEACOCK referred to *Rajah of Pittapur* v. *Sir Rajah Venkata Mahipati Surya* (2)].

1888
March 16.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This is an appeal from a judgment of the Judicial Commissioner of *Oudh*, affirming a decision of the District Judge of *Fyzabad*, by which he granted a decree for redemption of certain property said to be in mortgage. The mortgage deed is not produced, but there has been produced a memorandum under the seal of a predecessor in title of the Appellants, which stated upon the face of it that the property had been mortgaged and was subject to redemption. That memorandum has been held by two Courts to be a genuine document, and to be sufficient evidence of the alleged mortgage. The sole ground of appeal is, that the Respondent's suit ought to have been held barred by what took place in certain Settlement proceedings, for two reasons: (1) because the issue in this suit was substantially determined by the determination of an issue in those proceedings; and (2) because the Respondent was bound to have brought forward, in the previous proceedings, the mortgage transaction on which he relies in the present suit.

(1) Law Rep 2 Ind Ap 283.
(2) Law Rep. 12 Ind. Ap. 116.

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The Settlement proceedings may be stated very shortly. The Respondent in 1866 brought a claim to establish an alleged sub-proprietary right. That claim was dismissed on an admission by the Respondent that he never had held as sub-proprietor under the talukdar during the native rule, or during the term of limitation, that is the period from 1844 to 1856. The dismissal was confirmed by the Commissioner and also by the Financial Commissioner, Mr. *Barrow*. After that proceeding had come to an end a Government circular was issued, Book Circular 4 of 1867, which is known as "The Hard Case Circular," and thereupon the Plaintiff applied for a review of his case. The Financial Commissioner entertained the application and remanded the matter to the Settlement officer. The Settlement officer made a most minute and elaborate examination into all the circumstances. He found that the property had been conveyed to the talukdar by a conditional deed of sale, under which the purchase-money was to be repaid within the period of eight months, and that on the expiration of that period the sale became absolute. He also found that the talukdar had paid up certain arrears of Government revenue which ought to have been paid by the Respondent or his predecessors in title. The Financial Commissioner accepted the report of the Settlement officer, and refused to disturb the previous orders. Their Lordships are of opinion that proceedings under the Hard Case circular cannot be treated as judicial proceedings. It appears from the circular that the talukdars had engaged to take cases of proved hardship into their favourable consideration. But relief was to be granted not as a matter of right, enforceable by process of law, but as a matter of concession in a spirit of fairness and liberality. His appeal on the ground of hardship having been rejected, the Respondent then sought to avail himself of another circular. Adopting the finding of the Settlement officer that the talukdar had paid arrears of Government revenue, he sought to treat those arrears as paid on his account, and he brought a suit to recover the property under the terms of Circular No. 106 of 1869. That suit was dismissed. But it may be assumed for the purpose of this judgment that in that suit—which was a judicial proceeding—the Settlement officer reaffirmed his previous findings and determined that the property

had been transferred to the talukdar by a deed of sale, which was dated in February, 1853, and became absolute eight months after its date.

Is that determination a bar to this suit, founded, as the suit is, on a mortgage recognised as subsisting in 1854.

The section of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms: "No Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court." Now what was the question in issue in the former suit? The question was whether the Plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the Respondent's right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor. But if it be established that the Respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all?

Then comes the question was the Respondent bound to have brought forward his present claim in the former suit? Sect. 7 of Act VIII. of 1859 is in these terms:—"Every suit shall include the whole of the claim arising out of the cause of action, but a Plaintiff may relinquish any portion of his claim, in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." That section has already been under the consideration of this Board in the case of *Rajah of Pittapur* v. *Srò Rajah Venkata Mahipati Surya* (1); and the commentary upon it at p. 119 is:—"That section does not say that every suit shall

(1) Law Rep. 12 Ind. Ap. 116.

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include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out the cause of action'—meaning the cause of action for which the suit is brought." The Respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit.

Moreover it appears to their Lordships that the fair result of the evidence is that at the date of the former suit the Respondent was not aware of the right on which he is now insisting. A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of the section in question.

On the whole, therefore, their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that the appeal ought to be dismissed, and they will humbly advise Her Majesty in accordance with that view. The Appellants will pay the costs of the appeal.

Solicitors for Appellants: *Watkins & Lattey.*
Solicitors for Respondent: *Barrow & Rogers.*

TRILOKINATH SINGH . . . . . PLAINTIFF;

AND

PERTAB NARAIN SINGH . . . . . DEFENDANT.

J. C.*
1888
March 20.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Res judicata—Inconsistent Claims—Practice.

Held, that a suit founded entirely on an appointment in Plaintiff's favour, made in pursuance of a will of the deceased owner which had been declared to be revoked in a previous suit to which the Plaintiff was a party, is barred as *res judicata*:

Held, further, that the Plaintiff, having claimed under the will, could not be allowed to shift his ground and recover the property as being entitled thereto under a conveyance made by one entitled under the deceased owner's intestacy.

APPEAL from a decree of the Judicial Commissioner (Nov. 26, 1884) reversing a decree of the District Judge of *Fyzabad* (Sept. 25, 1882), and dismissing the Appellant's suit.

The question in the appeal was as to the right of the Appellant to the properties of the late Maharajah Sir *Man Singh*, and as to whether he was precluded by former decisions and proceedings from recovering in this suit such properties or any part of them.

The facts of the case are stated in the judgment of their Lordships.

Doyne, for the Appellant.

Graham, Q.C., and *Branson*, for the Respondent, were not called upon.

Reference was made to *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1).

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) Law Rep. 1 Ind. Ap. 228; Law Rep. 11 Ind. Ap. 197.

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TRILOKI-NATH SINGH v. PERTAB NARAIN SINGH.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a decision of the Judicial Commissioner of *Oudh*, given on the 26th of November, 1884, and the question is whether that decision is correct with reference to the course of proceedings which had been previously taken in the various Courts of *Oudh* and also before Her Majesty in Council.

Sir *Man Singh*, who was one of the great talukdars of *Oudh*, died on the 11th of October, 1870. He left a widow, the Maharani *Subhao Kunwar*, and a daughter named *Brij Raj Kunwar*, by a deceased wife, and also a son of that daughter, *Pertab Narain Singh*, the present Respondent.

The Maharajah made a will by which he gave all his property, moveable and immoveable, to his widow, with power to her to appoint a successor. *Pertab Narain Singh*, who was the son of the daughter, considering that he was entitled to the estates of the late Maharajah, according to the rules of descent established by Act I. of 1869, commenced a declaratory suit against the Maharani, and also against *Trilokinath*, the present Appellant, who had been appointed by the Maharani to be her successor, to have it declared that the will of the late Maharajah had been revoked by him, and consequently that the widow had no right to appoint *Trilokinath*. In that suit the first Court decided that the will had not been revoked, and the Judicial Commissioner upheld that decision; but upon appeal to her Majesty in Council it was held that the Maharajah had revoked the will, and that consequently the widow had no power to appoint *Trilokinath*. That decision was in July, 1877, and is reported in the 4th volume of the Indian Appeals, p. 228. It is there said: "It is now admitted on all sides, if it were ever seriously disputed, that the Appellant"—that is the Maharajah *Pertab Narain Singh*, the present Respondent—"can only succeed in his suit by establishing both the following propositions: 1. That the testamentary disposition which the Maharajah unquestionably had power to make and did make in April, 1864, was revoked or became inoperative in his lifetime. 2. That the Appellant is entitled to succeed to the taluk as the son of a daughter of the Maha-

rajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of sect. 22 of the Act I. of 1869, it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the taluk under the special canon of succession to intestate talukdars established by that section of the statute." Their Lordships then came to the conclusion that *Pertab Narain Singh* was the son of a daughter, and that he had been treated by the late Maharajah in all respects as his own son. They accordingly decided in his favour, and said: "Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the Appellant is the person who, under clause 4 of sect. 22 of Act I. of 1869, was entitled to succeed to the taluk; and that he has made out his claim for a declaratory decree to that effect." But then they add: "The declaration must, however, their Lordships think, be limited to the taluk, and what passes with it. If the Maharajah had personal or other property not properly parcel of the talukdari estate, that would seem to be descendible according to the ordinary law of succession." Their Lordships therefore merely declared *Pertab Narain Sing's* title to the taluks and whatever descended under Act I. of 1869. As to other property which was not included in that Act *Pertab Narain* would not have been the heir to the Maharajah during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act I. of 1869.

Subsequently *Trilokinath* applied to Her Majesty in Council for a review of that judgment, or for a rehearing, his ground being that he had not been properly represented in the former suit; that the person who had appeared as guardian for him had not been properly appointed his guardian. Their Lordships refused to advise Her Majesty to grant a review of the judgment, and stated that the only remedy which *Trilokinath* had was to bring another suit, to try whether he was bound by the decision. Accordingly, in 1879, he brought a suit to have it declared that he was entitled to all the property, moveable and immoveable, of the late Maharajah. Previously to the commencement of that suit, however, the widow had made a second appointment under the will, assuming it to be in force, appointing *Trilokinath* to

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TRILOKINATH SINGH v. PERTAB NARAIN SINGH.

take the estate at once. It has been contended that that appointment vested in *Trilokinath* not only the taluks, but also the right to the property to which the widow had succeeded upon the death of her husband. Whether that is so or not is not material. *Trilokinath* brought his suit, and he made reference to that document in the plaint. In paragraph 33 of that plaint, he stated: "So far as the now Plaintiff is aware, no further steps were taken in the prosecution of the said appeal until September, 1875, and in the meantime, that is to say on the 20th of May, 1875, the Maharani executed another document recognising the now Plaintiff as successor to the said Maharajah Sir *Man Singh*, and on the 31st of August, 1875, the Revenue authorities substituted the now Plaintiff's name as the proprietor of the estates in place of the Maharani."

In the record there is this statement:—"The counsel for the Defendant asks the Plaintiff as a preliminary, whether 'he is suing on the appointment executed by the Maharani on the 16th of August, 1872, or that mentioned in his 33rd paragraph of the 20th of May, 1875'? The counsel for Plaintiff answers without reservation that of the 16th of August, 1872." It is, however, to be remarked that in that suit, whether he was relying upon the document of 1872 or that of 1875, he asked to have it declared that he was entitled to the whole of the property moveable and immoveable, of the Maharajah.

The Judge by whom the second suit was tried found that the will had been revoked, following the decision of Her Majesty in Council, and dismissed the suit. On appeal to the Judicial Commissioner, certain points were laid down as those upon which the Judicial Commissioner was to decide, the second of which was: "Supposing the Plaintiff Appellant to be confined to the document executed in his favour by the Maharani *Subhao Kunwar* on the 16th of August, 1872, as the basis of his suit, has he, or has he not, any present *locus standi* in Court?" Then, thirdly: "Supposing the Plaintiff Appellant not to be confined to the document of the 16th of August, 1872, as the basis of his suit, then has there, or has there not, been any such valid appointment of the Plaintiff Appellant under the power conferred upon the Maharani by the will of the Maharajah as to give to the Plaintiff

Appellant cause of action?" Upon that the Judicial Commissioner decided that the will had not been revoked, and he held that the Plaintiff was entitled to a declaration in his favour. In the record the decree is stated as follows:—"Claim for declaration of right to the talukdari estates and all property, moveable and immoveable, belonging to the late Maharajah Sir *Man Singh*." He therefore treated the suit of 1879 as a suit relating not merely to the talukdari, but to all the property, moveable and immoveable, of the late Maharajah. He found that the will had not been revoked, and decreed "that the Plaintiff Appellant be, and he is hereby declared to be, the appointed successor of the late Maharajah Sir *Man Singh*, and to be absolutely entitled to the said Maharajah's estates." There is no doubt that the second suit of 1879 was brought for a declaration of the right of *Trilokinath* to the whole of the estates of the Maharajah, talukdari as well as non-talukdari, and that the decree of the Judicial Commissioner gave him a right to that property.

An appeal was preferred to Her Majesty in Council against that decision, but pending that appeal *Trilokinath*, on the 15th of August, 1882, brought another suit which is the suit now under consideration. In that suit he asked for possession of all the property of the late Maharajah. "Claim for possession of moveable and immoveable property left by the Maharajah Sir *Man Singh* deceased." That case coming on for trial, the first Judge followed the decision of the Judicial Commissioner in the second suit, and held that the will had not been revoked. An appeal was thereupon preferred to the Judicial Commissioner, but he very properly postponed delivering his judgment upon the appeal until after the decision of Her Majesty in Council upon the appeal which was then pending in the second suit. Upon that appeal, in which judgment was delivered in July, 1884, Her Majesty in Council reversed the decision of the Judicial Commissioner and dismissed the suit of 1879. The judgment of their Lordships is reported in the 11th volume of the Indian Appeals, p. 197, and at p. 210 they say: "In the result their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to order that the suit of the Respondent be dismissed, and that he pay the costs in the Courts below."

J. C. 1888

TRILOKINATH SINGH v. PERTAB NARAIN SINGH

It therefore appears that *Trilokinath*, the present Appellant, has never claimed the property except under an appointment made by the widow in pursuance of an unrevoked will. He has never claimed to be entitled to the estate, or any part of it, as having been conveyed to him by the Maharani by the appointment of 1875 as property which had descended to her in consequence of the Maharajah's having died intestate. The second suit was brought in respect of the whole of the property upon the ground that the will had not been revoked, and that the Maharani had appointed the property to him. That suit was dismissed by Her Majesty in Council upon the ground that the Plaintiff had no title to the whole or any part of the property in respect of which he was suing in that suit. The decree of Her Majesty in Council, in the suit in which *Trilokinath* asked for a decree declaring that he was entitled to the whole of the property, must be and is binding in this suit, in which he is asking, not merely for a declaratory decree, but to be put into possession of the whole property.

The claim of the Plaintiff in the present suit is founded entirely upon the will of the late Maharajah. Upon the strength of that will he is now asking to be put into possession of property to which Her Majesty in Council has decided that he has no title. It appears to their Lordships that *Trilokinath* is bound by the decision of Her Majesty in Council of 1884, and that the Judicial Commissioner was perfectly right in acting upon that decision and dismissing the present suit.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decision of the Judicial Commissioner, and to dismiss the appeal. The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Burton, Yeates, Hart, & Burton.*
Solicitors for Respondent: *Watkins & Lattey.*

GUNGA NARAIN GUPTA . . . . . PLAINTIFF; J. C.*
1888
AND
Feb. 7.
TILUCKRAM CHOWDHRY AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Particulars of Fraud must be alleged in the Plaint—General Words insufficient.

Where fraud is the ground of action, the particulars thereof must be set forth in the plaint, which otherwise should be ordered under sect. 53 of the Civil Procedure Code to be amended or rejected.

The use of such general words as "fraud" or "collusion" are ineffectual to give a fraudulent colour to the particular statements of fact in the plaint unless those statements taken by themselves are such as to imply that a fraud has actually been committed.

Wallingford v. *Mutual Society* (5 App. Cas. 697) followed.

APPEAL from a decree of the High Court (June 1, 1885), affirming a decree of the Subordinate Judge of zillah *Goalpara* (April 15, 1884).

The Appellant was the proprietor of a share of pergunnah *Tariah* in zillah *Goalpara*, and also of a share of the permanently settled lakhiraj tenure *Uchita* in the same zillah.

The two first Respondents having got a decree against the Appellant, proceeded to execute it by the attachment and sale of the properties above mentioned. At the sale they were purchased by the other Respondents.

Thereafter the Appellant applied under sect. 311 of the Civil Procedure Code to set aside the sale, but his application was dismissed, and in appeal the High Court affirmed the dismissal.

On the 18th of December, 1883, the Appellant after alleging that "as the Plaintiff was at enmity with the Defendants Nos. 3, 4, and 5, they, in collusion with the Defendants Nos. 1 and 2, had recourse to fraud and deceit, committed various illegal and fraudulent acts, and through their machinations they, Defendants Nos. 3, 4, and 5, with the intention of injuring the Plaintiff, prevented other persons from bidding for the aforesaid

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property, purchased it at the very low price of Rs.21,500, and caused loss beyond measure to the Plaintiff—the real market value of the property would be about Rs.75,000;" prayed that possession might be delivered to him of the aforesaid property, by setting aside and annulling the above sale as fraudulent and deceitful on the ground stated above.

The Subordinate Judge considered this allegation to be not sufficiently clear; the High Court that no fraud had been alleged.

Doyne, and *C. W. Arathoon*, for the Appellant, contended that to deter others from bidding at an auction sale was a fraudulent proceeding, and would justify the Court in ordering that the sale should be set aside. A sufficient allegation was made to enable issues and evidence to be taken and an adjudication made. Reference was made to sect. 152 of Act XIV. of 1882; *Rukhinee Bullubh* v. *Brojonath Sircar* (1); *Woopendronath Sircar* v. *Brojendronath Mundul* (2); *Sugden's* Vendors and Purchasers, 14th ed., p. 10; *Fuller* v. *Abrahams* (3); *Benjamin* on Sales, 3rd ed., p. 406.

Graham, Q.C., and *Branson*, for the Respondents, contended that no cause of action was disclosed on the face of the plaint or on the oral statement of the Appellant's pleader; and that no act constituting or evidencing fraud was alleged in the plaint. Reference was made to *In re Carew's Estate* (4). *Dart's* Vendors and Purchasers, new ed. p. 120; *Mason* v. *Armitage* (5); *Twining* v. *Morrice* (6); *Subbaji Rau* v. *Srinivasa Rau and Pulliah* (7).

Doyne, replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an action brought by a judgment debtor for the purpose of setting aside a judicial sale; and there are two sets of Defendants, the one being the judgment creditors, and the other the

(1) Ind. L. R. 5 Calc. 309.
(2) Ind. L. R. 7 Calc. 346.
(3) 3 Brod. & Bingh. 116.
(4) 26 Beav. 187.
(5) 13 Ves. 25.
(6) 2 Bro. C. C. 326.
(7) Ind L. R. 2 Mad. 264.

auction purchasers. The ground upon which the action is laid is said to be fraud.

The 50th section of the Civil Procedure Code (Act XIV. of 1882) provides that every plaint must contain a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose. By sect. 53, sub-sect. *d*, the Judge before whom the plaint depends is authorized, if it does not disclose a sufficient cause of action, to adopt one or other of two courses: he may at or before the first hearing either reject the plaint, or allow an amendment, to be made upon the spot or within a limited time, upon such condition as to payment of costs as he may think proper. When fraud is charged against the Defendants it is an acknowledged rule of pleading that the Plaintiff must set forth the particulars of the fraud which he alleges. Lord *Selborne* said, in *Wallingford* v. *Mutual Society* (1): "With regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." There can be no objection to the use of such general words as "fraud," or "collusion," but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been committed.

In the present case it is unnecessary to criticise the plaint minutely. Strike out the words "fraud," "deceit," "illegal and fraudulent acts," "machinations," and so forth, of which there is great superfluity, and what remains? Nothing, except an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character. In these circumstance, the Subordinate Judge, being of opinion that no cause of action was stated in the plaint, allowed an examination of the pleader for the Plaintiff. He did so, not with the view of taking evidence, or of ascertaining what was to be the evidence in the case, but with the very proper object of ascertaining whether the pleader was in a position to make, on behalf of the Plaintiff, an

(1) 5 App. Cas. 697.

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amendment of the plaint which would introduce a specific and relevant cause of action. Counsel for the Plaintiff—who is Appellant here—admitted that the effect of the declaration of the pleader was to make matters worse instead of better; and in that observation by the learned counsel their Lordships are quite ready to concur.

Their Lordships are accordingly of opinion that the judgment of the High Court is well founded, and must be affirmed. They are, however, of opinion that in disposing of this case upon the defects of the plaint as not setting forth a good cause of action, the Subordinate Judge ought not to have taken the course of dismissing the suit. If he did not allow an amendment as authorized by sect. 53 of the Procedure Code, he ought, in terms of the same section, to have rejected the plaint. That, according to sect. 56 of the Code, would have enabled the Plaintiff to present a fresh plaint in respect of the same cause of action if he found himself in a position at any future time to make averments which would give relevancy to his action. However, no objection seems to have been taken in the Court below to the form of the judgment, which was the same in both Courts, dismissing the action. No objection was stated in the Appellant's case, or raised by his counsel; and in these circumstances, and seeing that the time limited for bringing an action to set aside the judgment has already elapsed, their Lordships are of opinion that the ends of justice will be served by permitting the judgment of the Court below to stand in its present form.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from, and to dismiss the appeal. The Appellant must pay to the Respondents, *Surjeswari Baruani*, *Anundmoyi Baruani*, and *Kanchunpria Baruani*, who appeared at their Lordships' bar, the costs of the appeal.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitors for the Respondents: *Watkins & Lattey.*

SARDHARI LAL . . . . . PLAINTIFF; J. C.*
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AMBIKA PERSHAD AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Law of Limitation—Act XV. of 1877, *art.* 11—*Suit under Act X. of* 1877, *sect.* 283.

Held, that a suit under sect. 283 of Act X. of 1877, to set aside an order under sect. 280, releasing from attachment and sale property which had been seized at the instance of the Plaintiff in execution of his decree, is barred by art. 11 of Act XV. of 1877, unless brought within a year of the date of the order.

APPEAL from a decree of the High Court (Dec. 16, 1884) affirming a decree of the Subordinate Judge of *Bhagulpore* (Dec. 28, 1882) which dismissed the Appellant's suit.

On the 14th May, 1877, the Appellant obtained an *ex parte* decree for money as due under a mortgage, directing that the amount should be realized by sale of the mortgaged properties in the first place, and if they should prove insufficient "from the estate of *Nund Lal* deceased, the original judgment debtor."

In July, 1877, the Appellant applied for execution of his last mentioned decree by attachment and sale of the mortgaged properties, and attachment accordingly issued, and the 1st of October, 1877, was fixed for the sale of the mortgaged properties; but the sale was put off by various objections raised by the judgment debtors.

Those objections having been rejected, and the 2nd of August, 1878, fixed as the day of sale in execution, the Respondents other than *Rudermun Singh*, *i.e.*, the two sons and the wife and the minor grandson of the judgment debtor, *Bishenmun*, and the wife and minor son of the other judgment debtor, *Rudermun*, on the 19th of July, 1880, made by petition an objection to the sale on the ground that they were not parties to the decree about to be executed, which was for a personal debt of the judgment

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debtors, and that therefore the ancestral properties of the objectors were not liable to be sold at all, or at most that only "the partitioned right of the judgment debtors should be sold;" and they prayed that the right and interest of them, the objectors, should be exempted from the auction sale.

On the 31st of July, 1880, the Subordinate Judge made an order that "the objected property should be released on the ground of its being ancestral property, and that only the right of partition of the judgment debtor be sold. And he directed the judgment creditor, if desirous of selling such right of partition, to file a new inventory in two days."

This not having been done an order was made in the following December, striking the suit off the file; a petition for review of the order having been meanwhile heard and rejected.

The Appellant thereupon on the 18th of March, 1881, obtained a rule from the High Court calling on the objectors to shew cause why the order of the Subordinate Judge of the 31st of July should not be set aside as made illegally and without jurisdiction.

This rule was issued under the 622nd section of the Civil Procedure Code of 1877, amended by Act XII. of 1879, sect. 92. It was discharged on the 30th of June, 1881, on the ground that the Subordinate Judge had acted within his jurisdiction in making the order which he did under sect. 280 of the Civil Procedure Code.

The present suit was instituted on the 20th of May, 1882, and prayed for (*inter alia*) a decision that the mortgage which purported to be executed by the manager of the family was binding on the Defendants.

The Defendants other than *Rudermun Singh* by their written statements contended (*inter alia*) that the suit was barred by limitation as not having been brought within one year after the 31st of July, 1880.

The Subordinate Judge dismissed the suit as barred by limitation without going into evidence as to the Defendants' liability under the mortgage in question on the 28th of December, 1882.

The High Court affirmed this judgment as follows: "It seems to us that the Lower Court was right in holding that this suit was barred by limitation. It is clear that the order which led to

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this suit being instituted must be taken to have been passed under sect. 280 of the Civil Procedure Code. The Plaintiff therefore was bound to bring his suit within one year from the date of that order. It was, however, not brought till nearly two years afterwards. We have considered whether sect. 14 of the *Limitation Act* could be applied to this case in favour of the Plaintiff; but even if sect. 14 be applicable still it would not cover the whole of the time in excess of one year which elapsed before the suit was instituted. We are, therefore, not in a position to afford the Appellant any relief."

Doyne, for the Appellant, contended that the case did not fall within art. 11 of Act XV. of 1877. It was not a suit to establish the Appellant's right to the property comprised in the order of the 31st of July, 1880, or to obtain possession thereof. The order itself, too, was not, properly speaking, an order made under sect. 280 of Act X. of 1877, and should have been treated as a nullity. At all events a suit to set it aside did not come within art. 11. of the *Limitation Act*.

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question in this suit is whether it is brought in time to satisfy the exigencies of the law of limitation. The Plaintiff's case is, that he was aggrieved by an order passed on the 31st of July, 1880, and he now seeks to get rid of it in this suit. The order was passed in execution proceedings under the provisions of sect. 280 of the Code of 1877, and the effect of it was to allow certain objections that had been lodged to an attachment obtained by the Plaintiff in another suit in which he was Plaintiff and decree-holder, and to release from attachment the property which at his instance had been attached and put up to sale. The Plaintiff was entitled, under sect. 283 of the Code, notwithstanding the order in question, to institute a suit to establish the right which he claims to the property then attached and put up to sale. But then it is provided by the 11th article of the *Limita-*

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tion Act, Act XV. of 1877, that a suit by a person against whom an order is passed under sect. 280 of the Code of Civil Procedure to establish his right to the property comprised in the order must be brought within one year from the date of the order. Now this suit was not brought until the 20th of May, 1882, that is to say, about twenty-two months after the date of the order. It is clearly therefore out of time, unless it can be shewn that for some reason or other the case does not fall within the article of the limitation law.

Two reasons have been suggested why their Lordships should hold that the case does not so fall within the article. It is said that the article in question is aimed at orders passed against the persons who object to the attachment. But the answer is that it is aimed against persons who object to orders passed under sect. 280; and it is not suggested that there can be any person against whom an order can be passed under sect. 280 except the decree-holder himself. He therefore is the very person who, by sect. 283, is empowered to institute a suit to establish his claims, and who, by art. 11 of the limitation law, is confined to one year for the institution of that suit.

The other reason assigned is that sect. 280 does not contemplate that any order shall be made until after an investigation which is directed by sect. 278. The answer to that is that in the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion off-hand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. However that may be (and their Lordships do not desire to pronounce any opinion as to the extent of the investigation which is required under the Code), in this case the order was made; and it was an order within the jurisdiction of

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the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of limitation says that the Plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought.

Their Lordships are clearly of opinion that this case falls within the scope of the 11th article in question, and that the suit must fail upon that ground.

The result is that their Lordships agree with the Courts below; they think that the appeal should be dismissed, and they will humbly advise Her Majesty in accordance with that opinion.

Solicitors for Appellant: *T. L. Wilson & Co.*

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AND

MAHARANI JAIPAL KUNWAR . . . PLAINTIFF.

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ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

THREE APPEALS AND A CROSS APPEAL CONSOLIDATED.

Act I. of 1869, *s.* 13, *sub-s.* 1—*Construction—Interest in Estate—Will—"Maharani Sahiba"—Extrinsic Evidence—Relief granted while Prayer of the Plaint dismissed.*

Held, that the expression "Maharani Sahiba," according to the true construction of the will in which it was contained, was not a collective term comprehending both widows of the testator, but applied to the senior widow alone, except where the expression was qualified so as to leave no doubt that both were intended:—

Held, further, that extrinsic evidence of the testator's intention ought not to be admitted. That construction should be adopted which gives

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effect to the more reasonable and probable intention, having regard to the scheme of the will and the circumstances of the testator.

Abbott v. *Middleton* (7 H. L. C. 89) approved.

Held, that a junior widow's right to succeed to a life estate in her husband's talookdary property expectant on the determination of the senior widow's life estate therein, but subject to be defeated by a valid adoption, is an interest in such estate within the meaning of Act I. of 1869, s. 13, sub-s. 1.

Although the suit by the junior widow prayed for possession and partition, their Lordships, while dismissing the suit upon that footing, declared the Plaintiff to be entitled to the annuity directed by the will as and for her maintenance, and further declared that it was chargeable upon and payable out of the entirety of the testator's estate, talookdary as well as non-talookdary.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (March 27, 1886), reversing a decree of the District Judge of *Fyzabad* (Oct. 3, 1884).

The first Appellant and Respondent were respectively the senior and junior widows of the late Maharajah of *Bulrampur*, Sir *Digbejai Singh*, K.C.S.I., and the principal question between them in the appeal was as to the right of the Respondent to share in the estate moveable and immoveable left by her husband. The decision of that question depended on (1) the construction of and effect to be given to the provisions of the *Oudh Estates Act*, 1869 (see particularly sects. 13 and 22), whereby, according to the Appellant's contention, the Respondent was precluded from taking any benefits under a will not registered in compliance with the Act, as was the case here: and (2) the construction of and effect to be given to the Maharajah's will.

The Appellant contended that the words "Maharani Sahiba," occurring in the devise, which were admittedly in the singular number, applied to her alone, while the Respondent contended that she also was included in that expression.

The Courts below differed as to this question, the first Court holding that the Respondent had no right to anything more than a maintenance allowance given her by the will, while the Judicial Commissioner held that her right to the beneficial enjoyment of her husband's estate was equal to that of the Appellant.

The Maharajah left a will, dated the 15th of March, 1878, which was deposited with the Registrar under sect. 42 of the

Registration Act of 1877, but was not registered in accordance with the provisions of the *Oudh Estates Act*, 1869, s. 2. The will was in the Hindi character, and as translated by the Judicial Commissioner, omitting the preamble and certain details as to charitable and religious bequests, was as follows:—

"At this time, that is to say, up to the date of the writing of this document, I have no issue by my khas mahal; but, by the mercy of Almighty God, I am not yet without hope. If, by the favour of Almighty God, issue should be born of my khas mahal, whether it be of the senior or of the junior Maharani Sahiba, then let it be the owner of the entire riasat and of all the property moveable and immoveable, like myself, without the writing of any will. Perchance at some time I may lose hope of issue by my khas mahal, then in that case I have power to adopt whom I please; and having executed a deed in due form, I will cause it to be verified by the Government, and let that adopted son, as if he were an actual son, be the owner after me of the entire riasat like myself; provided that after the adoption no issue be born of my khas mahal, for in that case let the issue of my khas mahal be considered the owner of the riasat and of all the assets, moveable and immoveable, and let the adopted son have nothing to do with it, only let that adopted son be held entitled to receive food and raiment by way of maintenance during his life; and let not the amount of this maintenance exceed six thousand (6000) rupees yearly. Should I have no issue by my khas mahal, and in my lifetime find no opportunity to adopt, then in that case, without aliening moveable assets, let the Maharani Sahiba after me, be during $\frac{\text{her}}{\text{their}}$ lifetime the owner of the entire riasat and of the property moveable and immoveable. There is to the Maharani Sahiba full authority to select, and within two years to adopt, according to the custom of the family, and according to the Hindu Law, such minor male child of my family as $\frac{\text{she}}{\text{they}}$ may think fit. Should (God forbid) the said adopted son die in his minority, then again there is authority to the Maharani Sahiba to make a second adoption according to the above conditions; and let that adopted son be, in place of an actual son, the owner of the entire riasat and the assets moveable and immoveable, seated on the throne like myself. No one else can have any sort of claim; but

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may Government have a care that, in accordance with the above detail and decision, a son be adopted by the Maharani Sahiba within two years. Should, peradventure, the Maharani Sahiba die without adopting any son, or should that adopted son die in his minority, or without issue and intestate, then in that case let that person of my family be owner of my riasat and of all and several moveable and immoveable property, who may be lawfully held entitled according to the custom of the riasat. It will be proper for Government during the minority of the heir, to manage, as Court of Wards, all the assets of the riasat, with such advice and arrangement that the opinion of the District Officer and the Maharani Sahabi and some agent who is fit and a well-wisher of the riasat be associated therewith, in order that the settlement of the riasat and welfare of the ryots may prosper. Let the minor heir be well-educated, and let the necessary expenses of the riasat be met as may on occasion be expedient. Besides the expenses of the riasat, let the two Maharani Sahiba receive for their personal expenses from the money of the riasat, according to the subjoined detail, fifty-five thousand rupees a year, and let the two Maharani Sahiba spend this as each may please. This is the detail—the *Bari* Maharani Sahiba thirty thousand (30,000) rupees, and the *Choti* Maharani Sahiba twenty-five thousand (25,000) rupees. Let the rest of the cash assets, and the moveable property, remain in the treasury of the riasat, under the care of the Guardian of the Court of Wards; and on the heir attaining his majority let him make over to the said heir all the cash assets of the riasat, and the property moveable and immoveable, and let that heir be, like myself, the owner of the entire riasat, seated on the throne. It will be proper for my representatives to maintain for ever according to the instructions, and to provide according to the subjoined detail for such expenditure as is prescribed, on account of the almshouse, and dispensary, and school, and worship at the Shrine of *Bijulipur*, and the marriage of maidens of the *Jaswar* lineage, and may Government always take care that this endowment subsists, let it never be discontinued."

The Appellant accepted this translation as substantially correct, except where the words "her" "their" and "she" "they" appeared. It was

the Appellant's contention that the correct translation in those cases should be "her" and "she."

The District Judge's translation was in accordance with the Appellant's contention.

After the death of the Maharajah the senior widow applied for and obtained without objection an order for mutation of names in the Revenue Register in her favour, as being entitled to the property under the provisions of the will; and on the 8th of November, 1883, she publicly adopted the minor *Udit Narain Singh*, the son of *Guman Singh*.

The plaint which was filed by the junior widow on the 3rd of December, 1883, against the senior widow and her adopted son, claimed under the terms and provisions of her husband's will (1) Joint proprietary possession in equal shares of the immoveable property of her husband against both Defendants; (2) A division of the whole of the moveable property in accordance with the provisions of the will and Hindu law, and for recovery of a moiety thereof; (3) Mesne profits of the immoveable property from the date of the senior widow's possession up to the time possession might be given to Plaintiff.

The ground of this claim was that by the true construction of the will, the testator had bequeathed to both wives the proprietary right for life in the entire moveable and immoveable property, giving permission to the Maharani Sahiba (which it was contended meant the two widows) a power to adopt. Further, that as the Appellant had made an adoption without the Plaintiff's advice or consent it was illegal, and such being the case the adopted child had been made a party to the suit in order that the question of his right of adoption and his title, if any, to the property in suit might be determined by the Court.

On the 3rd of October, 1884, the District Judge decided that the will of the Maharajah was not registered according to law, but that the Respondent, being entitled as a widow to maintenance from the Maharajah's talooka, was a person who had an interest in such estate within the meaning of sect. 13, of Act I. of 1869, and was therefore entitled to the bequest of Rs.25,000 a year made in her favour in the will. Also that the Respondent was not included in the devise of the general estate to the "Maharani

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Sahiba," which referred to the senior Maharani alone, and that consequently the adoption by the senior Maharani alone was valid.

He accordingly decreed to the Respondent the annuity of Rs.25,000 from the date of the adoption, and dismissed the residue of her claim against both Defendants.

An appeal to the Judicial Commissioner against this judgment and decree was made by both parties: the appeal of the senior Maharani and the adopted son being limited to the award of the annuity, which they contended had not been asked for by the Respondent in the suit, and if asked for could not have been granted to her by reason of sects. 13 and 24 of Act I. of 1869.

The Judicial Commissioner remitted the case for the trial of certain additional issues, those now material being: 2. Is the Plaintiff a person other than one of those described in arts. 1 and 2 of sect. 13 of Act I. of 1869? 3. If she is not, then as regards her is the will operative or inoperative? 4. If the will be found to be operative as regards the Plaintiff, then to what extent is it so operative? 7. Is the Plaintiff competent to challenge the validity of the adoption?

The District Judge's opinion on the construction of sect. 13, and the resulting consequences was as follows: "The Plaintiff has to shew that she is a person who, under the provisions of Act I. of 1869, or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to this estate, or to a portion thereof, or to an interest therein, if the Maharajah had died intestate. As to the first position the learned counsel for the Plaintiff contends that as Plaintiff is one of those persons for whom a provision is made in the way of maintenance chargeable on the estate, she must be held to have an interest therein. The latest utterance of the Privy Council on this point is to be found in the *Goura Case* (1), where 'their Lordships are far from affirming that a mere title to maintenance would be such an interest therein as would come within this clause.' Plaintiff refers to another *Oudh* talukdar's case, *Ajudhia Buksh* v. *Rukmin Kuar* (2), where the Courts of *Oudh*

(1) *Haji Abdul Razzak* v. *Munshi Amir Haidar*, Law Rep. 11 Ind. Ap. 121.

(2) Law Rep. 11 Ind. Ap. 1; S. C. 10 Ind. L. R. (Calc.) 482.

held the widow to be a person who, both under the ordinary Mitakshara Law, and under the provisions of the *Oudh Estates Act*, would have succeeded in the event of the Rajah's intestacy to an interest in his estate in the sense of clause 1, sect. 13, of the Act; also that in the case of a widow, registration was not vitally necessary to the validity of the will. This precedent is not altogether in point, for the will in that case was upheld under clause 2 of sect. 13, in favour of a younger son; and as to clause 1, their Lordships, on the 17th of November, 1883, went no further than to say, 'without expressing any dissent from the opinion of the learned Judges of the Court below.' &c. The dispute was not between two widows, but between the eldest son of the third Rani as Plaintiff, and the fourth Rani with her minor son as Defendants. Moreover, it is not contended in the present suit that both the Maharanis would succeed under Act I. of 1869, if the Maharajah died intestate. The Plaintiff can succeed only if she can prove the will to be valid and in favour of Plaintiff and Defendant jointly, or that the succession must be guided by the ordinary Hindu Law.

* * * * *

"I find that in this unregistered will there is no bequest in favour of the Plaintiff beyond an annual allowance of Rs.25,000. Still, the question remains—Is such bequest inoperative under sect. 13, Act I. of 1869? In the absence of any decision by the Privy Council, I follow the ruling of the Judicial Commissioner in *Ajudhia Bukhsh* v. *Rukmin Kuar*, referred to in the Privy Council decision (1), that a widow entitled to maintenance out of a talooka must be considered to have an interest in the latter within the meaning of sect. 13 of the *Oudh Estates Act*, 1, 1869."

The material passages of the Judicial Commissioner's judgment are as follows:—

"On the second issue, he said—

"Clause 2, of sect. 13, Act I. of 1869, has no bearing upon the present case. Clause 1 runs thus: 'A person who, under the provisions of this Act, or under the ordinary law to which persons of the . . . . . testator's tribe or religion are subject, who would have succeeded to such estate, or to a portion thereof, or to an

(1) Law Rep. 11 Ind. Ap. 1; S. C. 10 Ind. L. R. (Calc.) 482.

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interest therein, if such talookdar . . . . . had died intestate.' The contention on behalf of the Defendants is that these words must be read distributively thus: 'A person who under the provisions of this Act would have succeeded to such estate or to a portion thereof: or who, under the ordinary law to which persons of the testator's tribe or religion are subject, would have succeeded to an interest therein if the talookdar had died intestate. It is contended that the wording of sect. 14 of the Act shews this to be the true reading of the clause. It is further contended that in the terms of sect. 22, clauses 7 and 8, the junior Maharani is not in the line of succession under the provisions of the Act; and that as the Maharajah caused his name to be entered in lists 2 and 5 of sect. 8, Act I. of 1869, and did not subsequently use the provisions of sects. 30 and 31 of the Act, and the maintenance of a junior widow of a talookdar is not due to her by reason of her husband's intestacy, but under the provisions of sects. 24 and 25, Act I. of 1869, she has no interest in the estate. And, lastly, it is contended that under no reading of clause 1, sect. 13 of the Act, could the junior Maharani be held to be in the succession as regards any part of the estate, because as the ordinary law of the *Bulrampur* estate is impartibility, she could only have taken if the senior Maharani had died without adopting. All that she had therefore was a contingent remainder. If I understand rightly the meaning of the learned District Judge he has accepted the contention of the Defendants for the distributive reading of clause 1, sect. 13, Act I. of 1869. I am unable to do so. I think that if the Legislature had intended to express the meaning for which the Defendants contend, the clause would have been drafted in the way in which the Defendants wish to read it. When the words of a law read in their ordinary sense are plain, we have no right to go behind such ordinary sense. 'The first and most elementary rule of construction,' (Maxwell on the Interpretation of Statutes, 2nd ed., p. 2) is . . . that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context, or in the consequences which would result from such literal interpretation, for concluding that the interpretation does

not give the real intention of the Legislature." The condition required by the ordinary sense of clause 1, sect. 13, Act I. of 1869, is that the person must be one who, if the talookdar had died intestate, would, either under the provisions of the Act, or under the ordinary law to which persons of the testator's tribe and religion are subject, have succeeded to the estate, or to a portion thereof, or to an interest therein. And, in my opinion, under the ordinary law to which persons of the Maharajah's tribe and religion are subject, the junior Maharani is clearly a person who, had the Maharajah died intestate, would have succeeded to a share in his estate. The fact that that share might have been divested by a subsequent adoption is immaterial."

Upon the fourth issue, after holding that sect. 67, Act I. of 1865, cannot be used in this case, but that sect. 68 applied, and that as there was an ambiguity upon the face of the will no extrinsic evidence as to the intention of the testator could be admitted; the Judicial Commissioner found that the Maharajah when he used the words "Maharani Sahiba" in his will used them in the Hindu sense of the word "wife," as covering both his wives. "And I think therefore that the will conferred upon the junior Maharani a share in the estate from the date of the Maharajah's death."

Upon the 7th issue he said, "I am of opinion that the Plaintiff is not competent to challenge the validity of the adoption, so far as the fact that it was effected without her consent is concerned; but that it is open to her to shew, if she can, that it was otherwise invalid. I think that the Plaintiff is not competent to challenge the validity of the adoption on the ground that she did not consent to it, because adoption is a religious ceremony, and the senior widow is therefore the proper person to perform it. The point as regards co-widows, and their powers in the matter of adoption, seems never to have been directly raised in the Courts of the *North-Western Provinces*, *Bengal*, or *Madras*; but as regards the right of the elder widow to precede the younger in the performance of religious duties, we have authority in the text-books current in those provinces. Thus we read in *Jagannatha's* Digest of Hindu Law, translated by *Colebrooke* (Ed. *Madras*, 1874, vol. ii., p. 124), '*Yajnyawalcya*: If there be several wives of his

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own class, such duties are lawfully performed by no other than the eldest. *Chandéswara* and *Vijnyánéswara:* If the first married wife be alive, she must be preferred in all matters relating to acts of religion. *Vishnu*: If many wives of his own class be living, with the eldest alone should the husband conduct business relating to acts of religion, even though his younger wives be dearer to him.' The point as regards co-widows has been raised in *Bombay,* in the case of *Rakhmabai* v. *Radhabai* (1). Messrs. *West* and *Buhler* give (3rd edit., vol. i., p. 412) the following *bywashtha:* 'Question.—A deceased man has left two widows. . . . . The property of the deceased has passed into the hands of the elder widow. Can the younger widow claim a share of the property? and who has the right to adopt a son? Answer.—The younger can claim a share. The right of adoption belongs to the elder.' And again, in vol. ii., p. 977, Messrs. *West* and *Bühler* give the following *placita* of the Shastris: 'The eldest of several widows has the right to adopt. On her death or disqualification the right passes to the next widow in order of marriage.' 'A man having directed an adoption, the elder widow may adopt against the wish of the junior.' And this view was the view taken by the High Court of *Bombay* in *Rakhmabai* v. *Radhabai* (1)."

The appeal was in part decreed, judgment being entered for the Plaintiff to the following effect, the rest of her suit being dismissed:—

"The senior Maharani will retain the management of the estates. From their net profits she will be entitled to deduct, year by year (*a*) the amount at which the pay bills of the home establishment, charities, &c., stood during the last year of the Maharajah's life, this amount to be ascertained by inquiry in the Execution Department; (*b*) such amount as after inquiry in the Execution Department may be found suitable for the maintenance and education of the minor. After these deductions are made, the Plaintiff will recover from the senior Maharani, Defendant, a half-share of the balance of the net profits of the estate; she will recover immediately whatever may be found to be due from the date of the Maharajah's death to the date of this decree; and thereafter she will be entitled to recover, year by year, until such

(1) 5 Bomb. H. C. 181.

time as Government may see fit to comply with the wishes of the Maharajah expressed in the fifth part of his will, a half-share of the balance of the net profits of the estate ascertained as above. The costs of this suit, both in this Court and in the Court of the District Judge, will be taxed as between solicitor and client, and will be a charge against the *Bulrampur* estate."

Sir *Horace Davey*, Q.C., and *Doyne* (*C. W. Arathoon* with them), for the Maharani *Indar Kunwar*, contended that the Respondent was not a person who in the events which have happened would have succeeded to the Maharajah's estate or to a portion thereof or to any interest therein if the Maharajah had died intestate. Sect. 13 of Act I. of 1869 was referred to. She would not have been entitled under the provisions of the Act to the talookdary property governed by that Act; see sect. 22, sub-sects. 2, 3 and 5. Neither would she have been entitled under the "ordinary law to which persons of the testator's tribe and religion are subject." For first, the talookdary estates of the Maharajah having been entered by him in lists Nos. 2 & 5 made under sect. 8, that ordinary law was excluded by the Maharajah's declaration, and by the provisions of the Act; and consequently those words occurring in sect. 13 have no application to the succession to the Maharajah's estate. Second, under the ordinary law the junior widow is not entitled to "succeed" within the meaning of sect. 13—that word meaning to "follow immediately after." Further as regards the talookdary estates, see sect. 24. The Plaintiff was entitled to maintenance, but maintenance is not an interest in the estate within sect. 13. She is not by force of sect. 24 entitled to any charge on the estate; she has a personal claim against the holder of the estate to be paid out of the estate. As regards "interest therein" a *spes successionis* is not included. No one was entitled to succeed after the Maharajah's death but the senior Maharani. That would exclude the junior widow. The estate having been entered in list No. 2 the unrebutted presumption was that it devolved on a single heir, in this case the senior widow, till adoption. On the death of the senior widow the junior widow, being in that case an excepted person under this section, could take under the will. Reference was made to *Ajudhia Buksh* v. *Mussamut Rukmin*

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Kuar (1), see the *quære* in the head-note; and *Haji Abdul Razzak* v. *Munshi Amir Haidar* (2). Under those circumstances, as the will was not registered under Act I. of 1869, and as the Respondent is not a person within either of the exceptions of sect. 13, the disposition in her favour, if any, failed. Otherwise according to the true construction of the will the whole of the property moveable and immoveable was devised to the senior widow alone during her life, and the Respondent took no interest under the devise. Whatever ambiguity there was in the words "Maharani Sahiba" was a latent ambiguity and therefore evidence was rightly admitted, and shewed the intention of the testator to be in favour of the senior widow alone. Reference was made to *Indian Succession Act* (X. of 1865), sects. 62 and 67; *Hindu Wills Act* (XXI. of 1870), sect. 2, Act I. of 1869, sect. 12: *Doe* d. *Gord* v. *Steeds* (3); *Doe* d. *Allen* v. *Allen* (4). As regards the adoption, that does not concern the senior widow's case. Reference was made to *Ramasawmi Aiyan* v. *Vencataramaiyan* (5); *Chitko Raghunath Rajadiksh* v. *Janaki* (6).

Sir *C. Russell*, Q.C., and *Rigby*, Q.C. (*Brook Little* with them), for the Appellant *Uditnarain Singh*, contended that if the will was held to be valid, then by the true construction thereof the elder widow was the sole donee of the power to adopt. Her adoption was valid without the consent of the Respondent. So far as the non-talookdari property was concerned, it became thereby the property of the adopted son. See Act I. of 1869, sect. 8. There is no ground for supposing that the testator would want to include the junior widow in the power to adopt: his leading purpose was that a son should be speedily adopted as a single heir. The senior widow's adoption was valid without the consent of the Respondent, whether the authority was given jointly or singly. The adoption of the Appellant was unconditional, and the Maharajah's estates vested in the Appellant immediately on his adoption. As far as the effective instruments are concerned, if the adoption itself is valid, its conditions may be disregarded. Act I. of 1869, sect. 22, sub-sect. 8. At a

(1) Law Rep. 11 Ind. Ap. 1.
(2) Law Rep. 11 Ind. Ap. 121.
(3) 2 M. & W. 129.
(4) 12 Ad. & E. 451.
(5) Law Rep. 6 Ind. Ap. 196.
(6) 11 Bomb. H. C. 199.

later stage she desired to annex conditions, but an adoption made by a proper person under legal authority is plenary and unconditional: *Kally Prosonno Ghose* v. *Gocoolchunder Mitter* (1).

Finlay, Q.C., and *Mayne* (*Forbes* with them), for the Respondent, contended that the decree of the Judicial Commissioner was in some respects erroneous, and ought to be varied. The suit required and admitted an adjudication as to the rights of the adopted son so far as they affected the Plaintiff. The adoption should have been declared invalid for want of the Respondent's consent. Probabilities were against the testator excluding one of his widows from the power to adopt. As to the argument against his doing so, derived from "capriciousness," see *West and Bühler*, 3rd Ed., p. 977; *Rakmabái* v. *Rádhábái* (2). The ambiguity of the expression "Maharani Sahiba," coupled with the absence of any indication which of the two widows was meant, is sufficient to shew that both were intended. The probability of a man with two wives using such an expression if he meant both, and avoiding such expression if he meant one, was urged. The word "khasmahal" ordinarily denotes the first married wife. The testator uses it to denote both his wives. He uses on the other hand *Choti* and *Bari* Maharani when he wishes to distinguish them. On the construction contended for by the Appellants the Respondent is left without any provision from the date of her husband's death till an adoption over which she had no control; for the annuity does not come into existence till the adoption. There is no gift of a power to the survivor of the widows; and that is strong to shew that both were intended. The adoption, moreover, is bad for three reasons. First, it was made under restrictions and conditions inconsistent with a complete giving and receiving, and not in strict pursuance of the authority; second, the ceremony was not completed by a writing, as required by Act I. of 1869, sect. 22, clause 8; third, the provisions contained in the will as to adoption and consequent devolution of property were invalid for want of registration under sect. 13. Reference was made to *Vinayak Nárayan Jog* v. *Govindrar Chintaman Jag* (3); *Chitko Raghunath*

(1) Ind. L. R. 2 Calc. 295. (2) 5 Bomb. H. C. A. C. J. 181.
(3) 6 Bomb. H. C. 224.

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v. *Janaki* (1); *Ramasawmi Aiyan* v. *Vencatara Maiyan* (2). [SIR RICHARD COUCH referred to *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (3).]

Next, as there was no registration of the adoption or of the will, succession was *ab intestato*. Reference was made to sect. 13. The object of that section was to prevent the talookdar from bequeathing his estate by an unregistered will to a stranger. Within the line of succession he might select and make an unregistered will. The Respondent was qualified to take by an unregistered will; first, under sub-sect. 9 of sect. 22; second, in respect of her right of maintenance, which gave her an interest in the estate under sect. 13. Besides, in case of intestacy, she had an interest in remainder expectant on the death of her co-widow. There is in effect in case of intestacy a statutory settlement on the first widow for life, on the second widow in default of adoption and contingent on her surviving. Then as to the right to maintenance being an "interest" in the estate, "interest" has a well-defined meaning in Indian law: see Act 1. of 1877; *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (4); *Rani Anund Koer* v. *The Court of Wards* (5). Act I. of 1869, sect. 14, made it a charge on the estate: so did the general law under certain circumstances: see *Juggernath Sawant* v. *Maharanee Odhiranee* (6). A reversioner has more than a *spes successionis*: see *Sri Raghunada* v. *Sri Brozo Kishoro* (7). Besides, the provisions as to registration did not apply to any except talookdari property governed by Act I. of 1869.

Rigby, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The question in these consolidated appeals turns mainly on the construction and effect of the will of the late Maharajah Sir *Digbejai Singh*. The parties to the contest are the two widows of

(1) 11 Bomb. H. C. 199.
(2) Law Rep. 6 Ind. Ap. 208, 196.
(3) Law Rep. 4 Ind. Ap. 1.
(4) Law Rep. 3 Ind. Ap. 72.
(5) Law Rep. 8 Ind. Ap. 14, 22.
(6) 20 Suth. W. R. 126.
(7) Law Rep. 3 Ind. Ap. 154.

the Maharajah, and an infant adopted by the senior widow. The litigation was commenced by the junior widow, who challenged the validity of the adoption, and claimed joint proprietary possession of the immoveable property and one half share of the moveable property of the late Maharajah, of which the senior widow had taken sole possession. The junior widow founded her claim on the contention that the expression "Maharani Sahiba" was used in the will as a collective term comprehending both widows. The senior widow maintained that it applied to her alone. The District Court held that the junior widow's claim was not well founded, and that she was only entitled to maintenance under the will. The Judicial Commissioner, on the other hand, held that the junior widow was included in the expression "Maharani Sahiba." He treated the adoption as valid. He held that the moveables followed the raj, which was impartible. But he considered that the junior widow was entitled to equal beneficial enjoyment with the senior widow until the Government should take action by assuming the management of the estate in accordance with the request contained in the will. In the meantime the management of the estate was to remain in the hands of the senior widow. The conclusion of the Judicial Commissioner has not given satisfaction to any of the parties to the litigation. The senior widow and the adopted son have both appealed from the whole decree. Up to a certain point the case of the adopted son is the same as that of the senior widow. They differ only in their views as to the consequence of the adoption and the present rights conferred thereby--matters which cannot come into question in this suit. The junior widow has also appealed. She appeals from the decree so far as it holds the adoption valid and the moveables impartible, and so far as it commits the management of the estate to the senior widow.

In order to construe the will it is necessary to understand the testator's position. The testator was one of the few *Oudh* chieftains who remained loyal to the British Government during the troubles of 1857 and 1858. At that time he was Rajah of *Bulrampur*. His services were acknowledged by the Government. He was excepted by name from the Proclamation which confiscated proprietary rights in the soil of *Oudh*, and named first in

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the exception. He received the title of Maharajah and large grants of land. He seems to have been a person of considerable intelligence. As President of the Oudh Talookdars' Association he took an active part in framing the *Oudh Estates Act*, 1869. He was also for a time, and at the time when the Act passed, Member of the Legislative Council of *India*. His name was entered in Lists Nos. II. and V. mentioned in sect. 8 of the Act. List No. II. is "A List of the Taluqdars whose estates according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir." List No. V. is "A List of Grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised therein shall thereafter be regulated by the rule of primogeniture." On both those lists his name remained during his life.

In 1860 the Maharajah married the Maharani *Indar Kunwar*, who is generally referred to in these proceedings as the senior widow. In July, 1877, he married the Maharani *Jaipal Kunwar*, who is the Plaintiff in the suit.

On the 15th of March, 1878, the Maharajah executed his will. The Maharani *Indar Kunwar* was then forty-one, and the younger Maharani nineteen. The will was deposited in the Registration Office of *Lucknow*, but owing to a misapprehension of the law which seems to have been prevalent at the time, it was not duly registered under the Act of 1869. It is evident, however, that it was the intention of the Maharajah to comply with all the formalities required to give full effect to the dispositions of his will.

On the 27th of May, 1882, the Maharajah died, leaving his two wives surviving. He died without legitimate issue, and without having adopted a son in his lifetime. Besides his talookdary estates he left non-talookdary property and moveables of considerable value.

Their Lordships now proceed to consider the testator's will. The effect of non-registration in the view which their Lordships take of the true construction of the will, will be considered afterwards.

The scheme of the will, apart from the bequest which has given rise to the present controversy, is clear and consistent throughout. In the various contingencies which it contemplates the will shews no little thought and consideration. The testator observes that at the time of writing his will he was childless, but not without hope of issue—when all hope of issue became lost he might adopt a son, and he proposes to do so if opportunity should occur—after adoption a son might be born to him. These events might happen in his lifetime. After his death, in default of issue natural-born or adopted by himself, he authorizes the adoption of a son. The son so adopted might die in minority, and then there would be occasion for a second adoption; lastly, in default of issue, and in default of an adopted son, it was his wish that his property should devolve on the person lawfully entitled according to the custom of the riasat. The testator provides for all these different events. And in each case he is careful to repeat and emphasise his wish that the estate shall devolve in its integrity, and that his successor, whoever he may be, shall like himself be seated on the guddee, the owner of the entire riasat, and of all the property belonging to it, moveable and immoveable. So far there seems to be the most anxious desire on the part of the testator that the principle of succession which had prevailed in his family for generations, and which was recognised in the talookdary lists, the rule of single heirship—one owner at one time—should be maintained unimpaired.

Turning now to the passages of disputed meaning, it is to be observed that the expression "Maharani Sahiba" occurs there in connection with three different purposes which present themselves to the mind of the testator. In the first place, it is to be found in the bequest of the estate contingent on the testator leaving no natural-born or adopted son. In that case the testator declares his will as follows: "Let the Maharani Sahiba after me be during lifetime the owner of the entire riasat, and of the property moveable and immoveable." Before the word translated "lifetime" there is in the original a possessive pronoun, but it may be translated either "her" or "their," and so it throws no light on the question. Maharani is a Hindu word, signifying the wife of a Maharajah; Sahiba is Arabic for "lady." Both

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words are in the singular number. They are, however, throughout used as governing verbs in the plural. No stress was laid on this circumstance. It was not disputed that the plural verb might properly be used out of courtesy, as a mark of respect. The use of the word malik, "owner," in the singular is more significant. The learned counsel for the junior widow suggested that the word was used like an adjective, and that it would not be in accordance with the idiom in which the will was written to use the plural, malikan. But no proof was offered in support of this suggestion. And though the use of the word "malik" in the singular is certainly not conclusive, it is not without weight, especially as it is the same word that is used by the testator in reference to the position of the single heir, on whom, whether a natural-born son, or an adopted son, or the heir according to the custom of the riasat, the property was to devolve in its entirety. On the whole, their Lordships are of opinion that the language of the bequest rather points to the exclusive possession of one than to the joint possession of two.

A similar observation applies to the provisions relating to adoption after the testator's death. "There is to the Maharani Sahiba full authority to select and within two years to adopt" a male child of the testator's family. In the event of the child so adopted dying in his minority, "again there is authority to the Maharani Sahiba to make a second adoption." The testator expresses a wish that "Government may have a care that . . . a son be adopted by the Maharani Sahiba within two years." "Should, peradventure, the Maharani Sahiba die without adopting any son," the estate is to go to the person lawfully entitled according to the custom of the riasat. The nature of the case seems to require that the donee of the power should be one individual. The language rather points in that direction. If the testator intended to commit the selection and adoption to his two widows jointly, it is certainly singular that no provision should be made for the not improbable event of their disagreeing. If he intended to give the power to the survivor after the death of one, it would have been more natural that he should have said so. It was urged that a joint power of adoption is in accordance with Hindu notions, that in some parts of *India*, when adoption

has not been forbidden by a husband, the power falls to the widows jointly, and that the law provides for the case of a disagreement. That is true in Western *India*, but there is no evidence that such a custom is known in *Oudh*. It seems hardly applicable to the case of a family where the custom is single heirship and not joint possession.

The third passage where the expression occurs is in the clause relating to the provision to be made for the administration of the estate under the Court of Wards during the minority of an infant heir. The testator expresses a wish that in the management there should be associated "the district officer and the Maharani Sahiba, and some agent who is fit and a well-wisher of the riasat . . . in order that the settlement of the riasat and welfare of the ryots may prosper." It is difficult to conceive that a man of the testator's experience and knowledge of the world could have proposed that his two widows should both sit on this council, or that he could have seriously imagined that the settlement of the riasat and the welfare of the ryots would be promoted by an arrangement so calculated to foster jealousies and encourage intrigues.

Though no one of these passages taken by itself may be conclusive upon the question, it seems to their Lordships that they all point in the same direction, and that taken together they lead almost irresistibly to the inference that one person, and one person only, was intended by the designation Maharani Sahiba where the meaning is in dispute.

This inference is much strengthened by the passage in the will where the testator provides maintenance for his widows. There he uses the same words, "Maharani Sahiba," but to prevent any mistake he adds the word "two," and speaks of "the two Maharani Sahiba." It was said that in this passage the word "two" was added because the intention was that the allowance should not be joint, but that each should have a separate share. But it is to be observed that this explanation hardly accounts for the use of the word "two" in the first sentence, where the allowance which is afterwards divided between the two ladies is lumped together as one sum of Rs.55,000.

Again, in that passage in which the testator speaks of his

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hopes of issue where he uses the expression Maharani Sahiba, he does not leave the expression unexplained.

We find then that in connection with the three purposes—of succession to the estate, selection and adoption of an heir, and representation on an administrative council during the heir's minority,—in each of which a great noble in the testator's position might be expected to have in view one person, and one person only, the testator uses the expression "Maharani Sahiba" without qualification and without addition. In the two passages in which he must have had both his wives in view, in connection with the possibility of issue and in connection with the usual provision for widowhood, he qualifies the words "Maharani Sahiba" by other words which leave no doubt as to his meaning.

It is not disputed that if one person only is intended that person must be the senior widow, who was, for some years before the Maharajah's marriage with the Plaintiff, the only person entitled to the style and dignity of Maharani Sahiba, and who after that marriage still retained the pre-eminence of an elder wife.

One argument which was urged on behalf of the junior widow remains to be noticed. It was founded on the maintenance clause. It was argued that, according to the true construction of this clause, having regard to its language and its position in the will, no allowance by way of maintenance was payable until an adoption was made. It was said too that it would be absurd to give an allowance out of the income of a property to a person entitled to a life estate in the whole. Starting from this position, the learned counsel for the junior widow contended that, if the Appellants were right, the result would be that there would be no provision for their client, so long as the senior widow chose to keep the estate. But nothing, they said, was more unlikely than that the testator could have intended to leave his favourite wife, as they termed the junior widow, either dependent on the miserable pittance to which she would be entitled under the Act of 1869, or a pensioner on the bounty of a jealous rival, especially considering that both widows were ultimately to be placed almost on an equality as regards their maintenance. The only way to escape from a conclusion so improbable was to hold that the testator intended to give a joint life estate to both widows.

There would be much force in this argument if it rested on a sound foundation. But their Lordships think that it depends upon an erroneous construction of the provision for maintenance. That provision is no doubt apparently bound up with the clause which deals with the expenses of the riasat during the minority of an infant heir. But their Lordships consider that, upon the true construction of the will, it is a substantive and independent provision, and that maintenance runs from the death of the testator. There is no difficulty in the concurrent gifts to the senior widow of an allowance for maintenance and a life estate in the whole property. The life estate was not intended to continue at farthest beyond two years, and the duty of the senior widow would be to adopt as soon as possible. So long as the life estate might last, her allowance for maintenance would of course merge in the life estate.

Their Lordships desire to add that, in their opinion, this is not a case in which it would be proper to admit extrinsic evidence of the testator's intention. It is rather a case in which the difficulty created by the particular expression ought to be solved by adopting the construction which bespeaks a reasonable and probable intention, and rejecting that which would indicate an intention unreasonable, capricious, and inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will which are not open to controversy.

The rule is laid down by Lord *Cranworth* in words which have often been cited with approval, "When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most grammatically accurate": *Abbott* v. *Middleton* (1). Here the argument from reasonable and probable intention is in favour of the construction which is rather the more obvious of the two.

Their Lordships have already expressed their view as to the right of the junior widow to maintenance from the testator's

(1) 7 H. L. C. 89.

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death. They think that the maintenance is payable out of the whole estate, talookdary as well as non-talookdary, notwithstanding the non-registration of the will. If the Maharajah had died intestate, the junior widow would have succeeded to a life estate in the talookdary property expectant on the determination of the life estate of the first married widow, but subject to be defeated by an adoption made by the first married widow, with the consent in writing of her husband. It seems impossible to say that that is not an interest in the estate within the meaning of sect. 13, sub-sect. 1 of the Act of 1869. Their Lordships do not think it necessary to express any further opinion on the construction of this most difficult section.

Although their Lordships hold that the claim put forward by the junior widow is not well founded, and that the order of the Judicial Commissioner granting relief on the footing of that claim must be discharged, they think it will be proper to make a declaration as to the allowance for maintenance to which they consider the junior widow entitled under the will.

As regards costs, the difficulty has been created by the testator himself, and under the circumstances, having regard to the position of the parties, their Lordships think it right that the order of the Judicial Commissioner as to costs should not be disturbed, and that the costs incurred in the execution proceedings in the Court of the Judicial Commissioner and the costs of all parties in these consolidated appeals should be paid as between solicitor and client out of the testator's estate. The appeal in the execution proceedings does not call for any observation beyond this—that the appeal seems to have been necessary, and that no blame of any sort is to be attributed to any of the parties who appeared before their Lordships on the application for special leave to appeal. The order of the 22nd of June, 1886, will be discharged.

Their Lordships will therefore humbly advise Her Majesty that an order be made to the following effect: Discharge the order of the Judicial Commissioner, except so far as it provides for costs. And in lieu of the decree of the District Court and of so much of the order of the Judicial Commissioner as is discharged, declare that according to the true construction of the will of the testator the junior widow is entitled only to an annuity during her life of

Rs.25,000, commencing from the day of the testator's death, and that such annuity is charged upon and payable out of the income of the entirety of the testator's estate. Discharge the order of the 22nd of June, 1886. Direct that the costs of all parties incurred in the execution proceedings in the Judicial Commissioner's Court be taxed as between solicitor and client, and paid out of the testator's estate.

The costs of all parties of these consolidated appeals will also be taxed as between solicitor and client, and paid out of the testator's estate.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondent: *Watkins & Lattey.*

CHUNDI CHURN BARUA AND OTHERS . PLAINTIFFS;

AND

RANI SIDHESWARI DEBI . . . . . DEFENDANT.

J. C.* 1888 *April* 24, 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Void Grant—Restraint on Alienation—Non-existing Grantees.

A conditional grant of villages to persons yet unborn who may happen to be the living descendants of the grantees named, to take effect at some future and indefinite period, on the grantor or any of his successors failing to maintain such descendants, is altogether void and ineffectual according to Hindu law. A covenant running with the estate of the covenantor, and binding its possessor to give the villages to non-existing covenantees in the event specified, would be equally void.

APPEAL from a decree of the High Court (July 8, 1884) reversing a decree of the Subordinate Judge of zillah *Goalpara* (Sept. 21, 1884).

The Respondent's husband was Rajah of *Vijni*, an ancient and considerable raj, part of which was till the Bhootanese War of 1864 tributary to *Bhootan*, and since then has become British territory, and the other part in which the lands lie has been British territory since 1765, and has been settled as two per-

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gunnahs, of which one is called *Khutaghat*, and comprises the four villages now in suit, called *Daborgaon*, *Salbari*, *Dingaon*, and *Bhotegaon*.

The Plaintiffs are of a family of the Kayest, or Soodra caste, which, through many generations, have been more or less continuously employed, as regards some of its members, in the service of the Rajahs of *Vijni*.

Before the Christian year 1776, they were in possession, under grants from the Rajahs of *Vijni*, of three villages called *Shamraipara*, *Mauriagaon*, and *Kaitpara*, and in this suit they claim further possession of the four villages above-named, under the conditions of an alleged instrument said by them to have been executed on the 15th Pous of the pergunnah year 1185, or December, 1776, by the then Rajah of *Vijni*, *Mukund Narain Bhup*, in favour of *Kasinath Barua*, who is said by the Plaintiffs to have died either childless or leaving only a daughter, *Ram Nath Barua* and *Ram Jibun Barua*, both of whom are also said to have died childless, *Dharamsil Barua*, the grandfather of the Plaintiff *Nund Coomar Barua*, and *Komlakant Barua*, the grandfather of the Plaintiffs *Chundi Churn Barua*, *Juggernath Barua*, and *Chunder Madhub Barua*, and by which instrument the Plaintiffs contend the *Rajah Mukund Narain*, with the object of soothing the wounded feelings of those five persons and inducing them to remain in his service, which they were about to quit in consequence of the Rajah having dishonoured the daughter of the first named of them, *Kasi Nath Barua*, agreed with them, as alleged in their plaint, "That from the date of that instrument the three mouzahs, *Kaitpara*, *Shamraipara*, and *Mauriagaon*, that were at that time in possession of the aforesaid ancestors of the Plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the aforesaid *Rajah Bahadoor* should in future maintain the sons, grandsons and heirs of the persons in whose favour the aforesaid gift was made; and that in default of this, they should relinquish to them the possession of the remaining four mouzahs, namely, *Bhotegaon*, *Dingaon*, *Daborgaon*, and *Salbari*; and according to the aforesaid documents, the heirs of the persons in whose favour the gift was made should be at liberty to take possession of the

aforesaid mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs.190 as mangon to the estate of the Rajah," and they alleged that in breach of that undertaking to support the Plaintiffs by service from generation to generation, the Defendant Rajah, in April, 1876, dismissed the first Plaintiff from his service, and did not provide the other Plaintiffs with service, though they were fit and proper persons and made applications to him for service.

And on that ground they claimed possession of the said four villages.

The Defendant raised a number of defences. The principal of them, and on which the judgment of the High Court proceeded, were that the alleged instrument of Pous, 1185 P.Y., was not genuine, and, if genuine, that it was not binding on the Defendant, and was illegal and void.

Mayne and *Arathoon*, for the Appellants.

Doyne, for the Respondent, was not called on.

The judgment of their Lordships was delivered by

LORD WATSON:—

This suit was brought by the Appellants in the year 1880, before the Court of the Subordinate Judge at *Goalpara*, for possession of the four mouzahs of *Daborgaon*, *Salbari*, *Dingaon*, and *Bhotegaon*, which are part of the *Vijni Raj* estate in *Assam*. The original Defendant was the late *Rajah Kumud Narain*; and since his death the estate has been represented by his widow, the *Ranee Sidheswari Debi*, who is Respondent in this appeal. The foundation of the Appellants' claim is a deed alleged to have been executed by the *Rajah Mukund Narain* the ancestor of the Defendant, in 1185 Perganati (1778 A.D.) in favour of certain members of the *Barua* family, to which the Appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms:—

"Let peace and health rest upon your dwelling, O *Kasi Nath Barua*, dewan, O *Ram Nath Barua*, O *Dharmasil Barua*, O *Koma-*

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lakant Barua, O *Ram Jibun Barua*. Inasmuch as because of my having caused the daughter of *Kasi Nath Barua*, dewan, to lose caste by taking her away, you and all your connections having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and forasmuch as from the days of the Maharajahs, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore, it is proper*) that I should shew you even greater kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say, as wages, I do hereby assign to you seven villages, namely, *Shamraipara*, *Mauriagram*, *Daborgram*, *Salbari*, *Kaitpara*, *Dingaon*, and *Bholegaon* in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*), and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages (*now held*) khas (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs.100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed, that *Kasi Nath* and *Ram Jibun*, two of the four grantees named in the deed, died without issue; and

that the Appellants are the living representatives of the other two, viz., *Dharmasil* and *Komolokant Barua*. They are still in possession of the three mouzahs of *Shamraipara*, *Mauriagram*, and *Kaitpara*, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of £4000 sterling. As might be expected in these circumstances, the Appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Rajah was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grants to descendants became at once operative in their favour, when the late Rajah dismissed *Chundi Churn* from his service in 1876, and declined to employ either him or any other of the Appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court—"Is the document filed genuine, and are the Plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the Respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law: that at any rate the contingency upon which it depends, is the failure of the Rajah to provide maintenance, and that no claim can lie so long as the Appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the Appellants decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law, that the conditional grant to defendants is valid and effectual, and that it became operative whenever the Rajah failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned judges (*Garth*, C.J., and *Beverley*, J.) held that the onus being upon them, the Appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they

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expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four *Baruas* named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words, "If ever in the time of my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four *Baruas* had actually been supported. There is an antecedent promise that these *Baruas* and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Rajah, at any future time, to maintain these descendants, however numerous, the latter

are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all, or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contract, but a covenant running with the Raj estate, and binding its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the Appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The Appellants must pay the costs of this appeal.

Solicitors for the Appellants: *T. L. Wilson & Co.*
Solicitors for the Respondent: *Watkins & Lattey.*

J. C.* 1888 May 2.

MUSSUMMAT CHAND KOUR AND ANOTHER DEFENDANTS;

AND

PARTAB SINGH AND OTHERS . . . . PLAINTIFFS.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Res judicata—Act X. of 1877, *ss.* 102, 103.

To a suit by reversionary heirs of the husband for a declaration that the widow's gift of her husband's estate was inoperative, the Defendants pleaded that it was barred, and it appeared that two of the Plaintiffs had, prior to the gift, and alleging the widow's intention to sell or mortgage, sued for a declaratory decree and an injunction, and that their suit had been dismissed in terms of sect. 102, Act X. of 1877:—

Held, that this suit was not barred by sect. 103, being founded upon a different and subsequent cause of action.

APPEAL from a decree of the Chief Court (May 16, 1884). The proceedings are stated in the judgment of their Lordships, the point for decision being whether the suit was barred as *res judicata*.

Mayne, and *Arathoon*, for the Appellants, contended that the suit was barred, both under sect. 13 and also under sect. 103 of Act X. of 1877. Reference was made to *Hunter* v. *Stewart* (1), a leading case, in which the decision was given by Lord *Westbury*, and also to *Thakoor Shankar Buksh* v. *Dya Shankar and Others* (2).

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD WATSON:—

In this case the Defendants in the original suit, who bring this appeal, are (1) *Mussummat Chand Kour*, widow of the late *Kahan Singh*, and (2) *Perak Singh*, to whom the first Appellant in 1879 made over by deed of gift the fee of her deceased hus-

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(1) 4 De G. F. & J. 168, 178. (2) *Ante*, p. 66.

band's estate. The Plantiffs and Respondents are the four nearest agnates of *Kahan Singh*, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative, and cannot affect their reversionary rights. It is admitted that *Chand Kour* has merely a widow's interest in the estate; and it is also admitted that *Perak Singh*, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued, on behalf of the Appellants, is that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the Respondents, *Partab Singh* and *Gopal Singh*, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then in possession of his widow. The plea in bar can only affect these two Respondents, and cannot exclude the other Respondents from obtaining a declaratory decree in this suit which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th of October, 1878, the Judicial Assistant Commissioner pronounced this order, which has become final: "As the Plaintiff has not appeared, though waited for up to the rising of the Court, and as the Defendant, who is represented by her agent, denies the Plaintiff's claim, it is ordered: That the case be struck off under sect. 102, Civil Procedure Code."

The provisions of sects. 102 and 103 of Act X. of 1877 require therefore to be considered. The dismissal of a suit in terms of sect. 102 was plainly not intended to operate in favour of the Defendant as *res judicata*. It imposes, however, when read along with sect. 103, a certain disability upon the Plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It refers entirely to the

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grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the Plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of first instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the *Punjab* upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the Plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not, refer to either sale or mortgage. It consists in an allegation that the first Defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second Defendant. That of itself is a good cause of action, if the Appellants' right is what they allege. It is a cause of action which did not arise and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Solicitors for the Appellants: *T. L. Wilson & Co.*

SRIMATI KAMINI DEBI . . . . . PLAINTIFF;

AND

ASUTOSH MOOKERJEE AND OTHERS . . DEFENDANTS.

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May 2, 3.

APPEAL AND CROSS APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res judicata—Act X. of 1877, *s.* 13.

In a suit by the daughter and heir-at-law of a testator for relief founded on the alleged invalidity of the will, it appeared that the Defendants had in a former suit against the Plaintiff obtained a decree in favour of the genuineness and validity of the will :—

Held, that by sect. 13 of Act X. of 1877 the present suit was barred.

APPEAL from a decree of the High Court (Sept. 15, 1883), reversing a decree of the Subordinate Judge of the 24-Pergunnahs (Sept. 3, 1881), and giving to the Appellant a portion of the relief prayed in her plaint, which had been wholly dismissed by the Court of first instance.

The object of the suit, which was instituted on the 6th of May, 1880, was to have the will of the Plaintiff's father, *Ramkomul Mookerjee*, dated the 23rd of Magh, 1251, B.Y., or the 4th of February, 1845, construed, and to have a determination of what provisions of that will were valid or invalid, and to have the rights of all persons interested under it, declared, and to have certain accounts taken, and to ascertain the nature and extent of the interest of a certain idol called *Gopaljiu*, endowed by the said will, in the testator's estate, and to have a proper person appointed as shebait, whether the Plaintiff or other person, of that idol, and to give the Plaintiff possession of those parts of the estate of her father to which her title should be established, and for partition of those parts in respect of which the rights of more than one person should be determined.

The first Court held the suit to be barred by the decision in a previous suit, in which the Respondent *Asutosh Mookerjee* and

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others were Plaintiffs, and the Appellant was one of the Defendants; and that the present suit, in which the Plaintiff claimed as heiress-at-law of her father, was barred by limitation, by reason of the adverse possession, for more than twelve years, of the Respondent *Asutosh Mookerjee's* father, *Modhu Soodun Mookerjee*, as shebait under the will. And the Subordinate Judge, in effect, declared the Plaintiff's only right to be, to maintenance along with other members of the family, so long as she continued to reside in her father's family dwelling, out of the "prosad" or offerings to the idol, and that she had no right to hold the appointment of shebait to the idol, which had properly devolved, under the will, upon the Respondent *Asutosh Mookerjee;* or to have any account taken, or partition of the estate directed.

In the High Court the plea of *res judicata* appeared to have been overlooked.

The Judges of the High Court were of opinion that the Lower Court was wrong in holding that "the property of *Ramkomul* had absolutely vested in the idol," but, taking for their guidance the following authorities: *Sonatun Bysack* v. *Juggut Soondree Dossee* (1); *Asutosh Dutt* v. *Doorgachurn Chatterjee* (2), and the *Tagore Case* (3), the learned Judges held, that, while the "evident intention of the testator was that his family and the families of his four brothers should all be maintained in perpetuity out of the 'prosad' or surplus proceeds after providing for the festivals and services of the idol, and the specific bequests mentioned in the will," such a trust in perpetuity would be contrary to Hindu law, but that the Court was "bound to carry out the intentions of the testator in so far as they could be carried out in a legal manner," and that that might "best be done by construing the will as a devise of the surplus proceeds for the benefit of the heirs of the testator himself, and of his four brothers in equal shares, so that the heirs of each of the five should be entitled to one-fifth of those proceeds."

And the High Court held that the Plaintiff was entitled to have a partition made of the estate remaining after setting aside

(1) 8 Moore's Ind. Ap. 66.
(2) Law Rep. 6 Ind. Ap. 182; S. C. Ind. L. R. 5 Calc. 438.
(3) Law Rep. Ind. Ap. Supp. Vol. p. 47.

"an ample portion of the family property for the worship, festival, &c., of the family idol."

Doyne, for the Appellant, in reference to the contention raised by the cross appeal, that the High Court should have dismissed the whole suit as *res judicata* by virtue of the decree made in the former suit brought in 1863, contended that circumstances had arisen in variation of the Appellant's case since 1864. The questions now subsisting between the Appellant and the Respondent *Asutosh Mookerjee* are different from those which were pending in 1864. Reference was made to *Sonatun Bysack* v. *Juggut Soondree Dossee* (1) and *Soorjeemony Dossee* v. *Denobundoo Mullick* (2).

Mayne, and *Arathoon*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships do not think it necessary to call upon counsel for the Respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. *Doyne*, that they are bound to decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator *Ramkomul*, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the prosad," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who were shebaits until October, 1879. The survivor of the brothers was named *Modhu Soodun*, and he remained

(1) 8 Moore's Ind. Ap. 66. (2) 6 Moore's Ind. Ap. 526.

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in the management for a great number of years. He died in 1879, and then his son *Asutosh*, the Defendant in the present suit, took the office of shebaitship and the management of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the Plaintiff's mother, who was one of the shebaits, died, and the Plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorizing her to collect the assets of the testator, on the ground that she was entitled to the property; that is to say, she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was *Modhu Soodun*. The sons of *Modhu Soodun*, of whom the principal appears to have been the present principal Defendant *Asutosh*, complained that he had made improperly a sale of part of the testator's property to one *Adhur Chunder Banerji*. They also complained that a person of the name of *Bissumbhur*, who was an execution creditor of *Ramkomul*, was improperly attaching his assets, and they made *Modhu Soodun*, *Adhur Chunder*, and *Bissumbhur* defendants to the suit, attacking the purchase of *Adhur Chunder* and the execution proceedings of *Bissumbhur*. But they also made the present Plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "That the Court on giving effect to the above will may be pleased to set aside the purchase by the Defendant *Adhur*," release the items attached by the decree holder, and prohibit the Defendant *Modhu Soodun* "from infringing the terms of the will hereafter."

The present Plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the court "to dismiss this unjust claim and uphold rights which I have to the properties left by my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the

issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the Plaintiffs had any right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgment delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The Court is decidedly of opinion that the Plaintiffs have a right of action, inasmuch as their vested right has been infringed upon by the acts of the trustees," that is of the shebaits; and again, "That the Plaintiffs have as well a vested right of maintenance from the prosad of the idol, as a contingent one of superintendence and management of the endowed property cannot if the will is genuine be doubted for a moment." That is to say, he held that the Plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the prosad of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgment, but it is only necessary to quote one passage from the Record. "The gravamen of the Defendant's contention now is that the endowment was illegal, as far as the Hindu law was concerned, and it was only nominal, it being got up by the brothers of the testator, who were chiefly interested in giving effect to the will. On carefully weighing these objections and considering all the surrounding circumstances of the case, I am of opinion that the provisions of the will are no more repugnant to the principles of the Hindu law than was the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The will under review, after providing for legacies, created an endowment on behalf of the family idol, and directed to appropriate the surplusage, if any, for the benefit of the children of the trustees. Viewing then the will in its true light, and

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analysing its provisions with reference to the principle recognised in the above authoritative ruling, I am of opinion that the will is perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be declared genuine," and so forth, and he gave costs against the present Plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and secondly, that the Plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present Plaintiff was not satisfied with that decree and she appealed to the High Court, and one of the grounds of appeal was thus stated: "The alleged will of *Ramkomul Mookerjee*, even if genuine, was revoked by his conduct, and is invalid under the Hindu law, and indefinite and incapable of being carried out with reference to the different provisions of it, the trust being nominal;" that is illusory. Another ground was "that the rights of all parties under the will, if genuine, have not been properly interpreted." Upon that the High Court again examine the question of the validity of the will. It appears to have been argued on behalf of the Defendant *Bissumbhur* more than on behalf of the Defendant *Kamini*, the present Plaintiff, but it was argued before them "that while holding the will to have been really signed and registered by *Ramkomul*, we should consider it as a scheme for retaining property which was in reality joint in the hands of all the members, and for holding the creditors of the estate or of any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus:—"On the whole then we think that the arguments both for *Kamini* and for *Bissumbhur*, that the will is either a nullity or a disguise to throw dust in the eyes of creditors, fail when weighed against" the considerations that they mention; and they conclude "that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members

of the family take only maintenance from the offerings made to the idol, and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is:—"That upon a proper interpretation of the will of the said *Ramkomul Mookerjee* the Court will be pleased to determine and settle those provisions which are valid and lawful, and those which are illegal and invalid." Unless something in the will is illegal and invalid the Plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebaitship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the Plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the Plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu law entitled to maintenance from them, shall be entitled to participate in the daily prosad of" the idol, and to reside in a certain dwelling-house which was another matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from that decree to the High Court which differed in opinion from the Subordinate Judge. On reading the judgment of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the Plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross appeal presented by *Asutosh*. Their Lordships are left without any means of understanding how it was that the judgment came to be delivered without any observation upon the suit of 1863. However, the

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matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by sect. 13 of the Act X. of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863; in a suit in which the present Plaintiff was Defendant, and the present Defendants were Plaintiffs. Their Lordships' reasons have been assigned for thinking that the question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of *Ramkomul*. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties, and never can be reopened.

Then there remains only one question to be decided in the suit, and that is whether the Plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar, and he delivered as his opinion that the effect of the will was to constitute as shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The Defendant *Asutosh* is the next senior in age, and therefore the Subordinate Judge held that *Asutosh* is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the Plaintiff wholly fails, and the cross appeal only succeeds. The High Court in their Lordships' opinion ought to have dismissed the appeal to them with

costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The Appellant *Kamini* must pay the costs of the appeal and the cross appeal.

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Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondents: *T. L. Wilson & Co.*

APPASAMI ODAYAR AND OTHERS . . . PLAINTIFFS;

AND

SUBRAMANYA ODAYAR AND OTHERS . . DEFENDANTS.

J. C.* 1888 *May* 3, 4; *June* 23.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Limitation—Sect. 1, *cl.* 13, *of Act XIV. of* 1859—*Effect of later Limitation Acts.*

A suit to recover a share of joint family property not brought within twelve years from the date of the last participation in the profits of it is barred by sect. 1, cl. 13, of Act XIV. of 1859; and once barred, the right to sue would not be affected by the later Acts of limitation.

APPEAL from a decree of the High Court (April 1, 1884), which reversed a decree of the Subordinate Judge of *Combaconum* (April 13, 1882).

The question in the suit was as to the Plaintiffs' right to have partition made, and a one-fourth share decreed to them, of the joint ancestral estate (moveable and immoveable) belonging to the Plaintiffs and Defendants.

The Defendants set up a previous partition between their ancestors and the ancestor of the Plaintiffs, that the property in their possession was the self-acquisition of their own ancestors, with which the Plaintiffs had no concern; that the Plaintiffs had never been living in coparcenary with them as an undivided family, and that the suit was barred by the law of limitation. The Subordinate Court found in favour of the Plaintiffs, being of opinion that there had been no partition between the respective branches of the family, and that the property in the possession of the Defendants was not their self-acquisition. The High

* *Present*:—LORD MACNAGHTEN, LORD HOBHOUSE, and SIR RICHARD COUCH.

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Court did not disagree with these findings, but held that the suit was barred by lapse of time, being of opinion that from 1837 "the two branches had acted as if they had no community of interest, and that the Plaintiffs' branch had neither directly nor indirectly participated in the beneficial enjoyment of the property in dispute." The question in the appeal is whether the suit was barred or not.

The facts are stated in the judgment of their Lordships.

Cowie, Q.C., and *Doyne*, for the Appellants.

Mayne, and *Johnstone*, for the Respondents, were not called on.

The following cases were cited: *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1); *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (2).

1888 June 23.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is a suit between the members of a Hindu family, of which the common ancestor was one *Ramalinga Odayar*. He had two sons, *Kutti Odayar* and *Subramanya Odayar*. *Kutti* had an only son, *Thoppai*, who had three sons, one of whom died without issue; another, *Subba*, had three sons, who have died without leaving issue; and the third, *Sabhapati*, left an only son, the second Defendant, *Sami Odayar*. *Subramanya* had two sons *Karuttasami* and *Chidambara*. *Karuttasami* had an only son, *Palaniappa*, the father of the three Plaintiffs, and *Chidambara* left an only son, the first Defendant, *Subramanya*. At the time the suit was instituted the Plaintiffs and Defendants were the only remaining members of the family. The share of the Plaintiffs would be one-fourth if they are entitled to any part of the property claimed in the suit. They sued for possession of that share. The first Defendant, *Subramanya*, in his written statement, said that the Plaintiffs and Defendants were not members of an undivided family; that no portion of the property sued for was ancestral property of *Chidambara* and *Thoppai*; that they lived jointly, and acquired some property through their own

(1) Law Rep. 7 Ind. Ap. 181. (2) Law Rep. 9 Ind. Ap. 99.

exertions, and the properties in litigation consisted of such self-acquisitions, and of property subsequently acquired by their descendants, including the Defendants.

Palaniappa, the father of the Plaintiffs, was married in 1837, and there is no doubt that up to that time the descendants of *Ramalinga* were a joint family. The material questions are, whether *Palaniappa* then separated himself from the family in respect of the family property, or if he did not, whether he afterwards participated in the profits of it. It appeared from the evidence of *Kuppu Odayar*, who was connected by marriages of his own and his younger brother's daughter with both the Plaintiffs and Defendants, that *Palaniappa* married the daughter of *Kuppu's* paternal uncle, and on his marriage went to live at *Karuppattimulai*, the village of that family, which is about ten miles distant from *Aravur*, the residence of the *Ramalinga* family. At that time the family at *Aravur* was reduced in circumstances, and a moiety of the village of *Karuppattimulai* was given to his wife by her family. *Palaniappa* continued to live at *Karuppattimulai*, and died there. The property thus acquired by him consisted of rather more than 14 velis of land, and it is said by the High Court that the family at *Aravur* probably owned about 35 velis, of which *Palaniappa's* share would have amounted to $8\frac{3}{4}$ velis. The High Court say that this fact, and the evidence of *Kuppu Odayar* as to the circumstances of the family at *Aravur*, convey the impression that *Palaniappa* did not probably intend or care to claim a share from his coparceners. It may be that he did not; but in order to see whether he lost his right to a share, what was done afterwards must be considered.

By sect. 1, clause 13, of Act XIV. of 1859, a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st of July, 1871, when Act IX. of 1871 came into force. Consequently, if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law they would not revive the right of suit.

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The Plaintiffs sought to avoid the law of limitation by evidence of the actual receipt of money, by payments of marriage expenses by *Chidambara* and *Sabhapati*, and by residence in the family house at *Aravur*. *Appasami*, the 1st Plaintiff, in his evidence said that about fifteen years ago he took from *Aravur* Rs.2000 or Rs.3000. This, if true (and he was not corroborated), would not avail to prevent the operation of Act XIV. of 1859.

There was evidence of the payment by *Chidambara* of the expenses of the marriages of members of the Plaintiffs' family, when there was at the same time a marriage in his own family. The High Court justly say that this evidence is vague and unsatisfactory. Even if true it cannot be said to prove a participation in the profits of the estate received by *Chidambara* as manager for the family. As to the residence, their Lordships have been carefully referred by Mr. *Doyne* to all the evidence on this subject. It is conflicting, and the evidence of *Ramu Odayar*, one of the Defendants' witnesses, is, that the Plaintiffs would come to *Aravur* on marriages and deaths, and take their meals either in the old or new house, and would either come alone or with their family. This would explain what residence there was, and is more probable than the Plaintiffs' case, that the eldest member of their branch of the family resided at *Aravur* as a member of the joint family. Looking at the whole of the evidence, it appears to their Lordships that, whatever may have been *Palaniappa's* intention when he left *Aravur*, a suit for his share of the family property became barred by the law of limitation. This was the decision of the High Court, which reversed the decree of the Subordinate Judge and dismissed the suit. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and dismiss the appeal. The Appellants will pay the costs of it.

Solicitors for Appellants: *Burton, Yeates, Hart & Burton.*
Solicitors for Respondents: *Gregory, Rowcliffes & Co.*

T. R. ARUNACHELLAM CHETTI . . . PLAINTIFF;

AND

V. R. R. M. A. R. ARUNACHELLAM CHETTI AND ANOTHER, BY THEIR GUARDIANS . . . } DEFENDANTS.

J. C.*
1888
June 27.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Execution Sale—Waiver—Objections should be made before Sale—Sect. 311 *of Act XIV. of* 1882*—Proof of Substantial Injury.*

Where the judgment debtors allowed the execution sale of the whole of their property to proceed without raising any objection of insufficient description, or to the effect that part ought to have been sold instead of the whole:—

Held, that the sale could not afterwards be set aside at their instance on those grounds:

Held, further, that in all cases of irregularity under sect. 311 of Act XIV. of 1882, evidence must be given of substantial injury having resulted therefrom.

APPEAL from a final judgment and orders of the High Court (October 16, 1883), which reversed the proceedings of the District Court of *Madura* in execution of a decree against the Respondents.

Those proceedings are sufficiently stated in the judgment of their Lordships.

Mayne, for the Appellant.

Doyne, and *Cowell*, for the Respondents.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal against two orders and one judgment of the High Court of *Madras*, which reversed the proceedings of the Subordinate Court of *Madura* in execution of a decree in a suit which had been brought in that Court. The Respondents were Defendants in the suit, and in execution of the decree which had

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been obtained against them, a village called *Kattanoor* was sold by the order of the Court, and was purchased by the Appellant. The High Court, by their judgment, which is now appealed against, set aside the sale, and the grounds upon which they did so are stated by them to be that: "It is clear that the description of the properties advertised for sale was most imperfect. The judgment debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property; and there was nothing to indicate the possession by the judgment debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case." . . . "It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs.40,000, together with mortgage claim for Rs.40,000, for Rs.20,000." Then they say they must set aside the order confirming the sale and also another order made upon another petition, by which an application to set aside the sale was refused.

It is true, as stated by the High Court, that the judgment-debtors had proprietary rights in a part of the property, and were only mortgagees of the other part. The decree was obtained in January, 1880, and an application was made to the Court for the execution of it, and attachment was made of the village, which contained fifteen hamlets; there was the usual proclamation of the sale and notification that it was to be on the 22nd of July, 1882, and the usual warrant, and apparently the judgment-debtors knew perfectly well that the whole of the village was going to be sold. They state in an application which they made that "the *Kattanoor* village of these Plaintiffs has been attached on account of the said debt, and the sale is fixed by this Court for the 22nd instant." Notwithstanding this, the first complaint which was made by them was, on the 29th of July, 1882, and in their petition they complained that the village had several hamlets attached to it, and if one of them alone had been sold it would have been sufficient. They also complained that one moiety of the villages belonged to them by right of mortgage, and the other they had their property in, raising for the first

time the objection upon which the High Court has founded its judgment. The sale was completed, and they then petitioned the High Court on the 9th of September, 1882. In this petition they state that the villages ought to have been sold each by itself and not all in one lot, and that the villages being separately numbered for the attachment there was no necessity for a representation that they should be separately sold.

Upon that petition an order appears to have been made by the Chief Justice in which he says:—"I see no irregularity. The judgment debtor might have applied that the sale should be made in lots." There is a distinct opinion of the Chief Justice that the judgment debtors might, if they had considered the sale of the villages in one lot would have been unfair, have made an application to have them sold in lots, which they did not do. However, notwithstanding the Chief Justice's opinion that there was not any irregularity he admitted the appeal, and the High Court, when the appeal came before them, made this order. "We require the Court below to ascertain and report what is the interest enjoyed by the family in the villages, whether it intended to sell the mortgage and other rights; whether the Appellants in that Court made any complaint of the insufficiency of description in the proclamation of sale, and whether any injury has occurred to the Appellants from any such insufficiency." It would appear from what the High Court then directed to be ascertained and reported that they were satisfied with the opinion which had been expressed by the Chief Justice that there was no ground for saying that the sale ought to be set aside because it had not been sold in lots.

A report was made by the Subordinate Judge, and it is this:—"There are four points sent down for report: (1.) The interest enjoyed by the family in the villages is as stated in the judgment of their Lordships. (2.) The sale proclamation says that the right, title, and interest will be sold, and this must include the mortgage and other rights, but they were not specified. (3.) No complaint was made of the insufficiency of description in the proclamation of sale. Two petitions are relied on by the Petitioners, one dated the 29th of July, 1882, and the other dated the 7th of August, 1882. The first petition is said to be

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before the High Court. The second petition makes no such complaint. (4.) As I find that no such complaint was made I thought that any evidence as to any injury resulting from such insufficiency was unnecessary."

Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating the sale—for that appeared to be the contention of the counsel for the Respondents—the objection was not taken until the sale had been completed. The judgment debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in *Olpherts* v. *Mahabir Pershad Singh* (1), that if there was really a ground of complaint, and if the judgment debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

There is another objection to this decree of the High Court. The law provides, by sect. 311 of Act XIV. of 1882, that an objection may be taken by the judgment debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the Applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity,

(1) Law Rep. 10 Ind. Ap. 25.

did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the High Court in doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them, and they give judgment, they assume that there was a substantial injury, and that the property, in consequence of the misdescription, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and, therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court which were appealed against affirmed, and the costs in the Subordinate Court ordered to be paid by the Respondents. The Respondents will pay the costs of this appeal.

Solicitors for Appellant: *Lawford, Waterhouse, & Lawford.*
Solicitors for Respondents: *Roucliffes, Rawle & Co.*

J. C.* 1882 March 1, 2, 3, 8; April 21.

SRI AMMI DEVI GARU . . . . . PLAINTIFF;

AND

SRI VIKRAMA DEVU GARU (A MINOR, REPRESENTED BY THE COLLECTOR AND AGENT TO THE COURT OF WARDS) . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Adoption of only Son—Authority to adopt.

Case in which it was held on the evidence that an alleged authority to adopt had not been proved.

Quære, whether an adoption of an only son is valid.

APPEAL from a decree of the High Court (Dec. 20, 1884) reversing a decree of the Subordinate Court at *Vizagapatam* (March 17, 1882).

The suit was instituted by the mother of the Appellant, who was the junior Rani of *Madgole*, against the senior Rani, the minor Respondent sued by his adoptive mother and guardian and the Collector of *Vizagapatam* and Agent to the Court of Wards. Its object was to set aside the adoption of the minor Respondent, which had been made by the senior Rani under an alleged oral authority by her husband, confirmed by his will, said to have been executed a few days before his death. Her plaint also challenged the validity of the adoption as being of an only son.

The Subordinate Judge held that no authority had been given and that the will was a forgery, and accordingly set aside the adoption. The High Court reversed these findings of fact and dismissed the suit. In reference to the validity of the adoption of an only son, the following passage of the judgment is material.

"There is the further point, viz., the question whether the adoption is valid in respect of the competency of the person adopted? At the hearing we were inclined to refer to a full bench for consideration the question whether it has been rightly held that an eldest or only son can legally be adopted. The point has been

* *Present*:—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

decided in this Presidency in favour of the validity of the adoption, and in a case under the Mitakshara law, a decision of the High Court of *Bengal* to the same effect has been approved by the Privy Council. We, therefore, fear that it would be useless to ask the Court to reconsider a question of law on which the highest tribunal has pronounced an opinion, seeing that the reasons on which we still entertain doubt as to the validity of such an adoption have been stated with great ability by Mr. Justice *Mitter*, of the *Calcutta* High Court. The essence of adoption being gift, the competency of the giver is essential to the effectual creation of sonship, and the Hindu law, as we understand it, declared the Hindu householder incompetent to give either his wife or his only son. Moreover, in the various treatises which illustrate the later law obtaining in this Presidency, we find that the commentators when discussing restrictions which some writers imposed on adoptions, and declaring that they could not apply in cases of necessity, are generally careful to add that the adoption is valid if the boy be a younger son. We should be glad if opportunity arose for the re-consideration of this question by the Privy Council, but until the present precedents are overruled, we feel ourselves constrained to follow them. We do not, therefore, direct an inquiry as to whether the Appellant was the eldest or the only son of his father.

"We reverse the decree of the Court of first instance, and dismiss the suit with costs."

Mayne, and *Johnstone*, for the Appellant.

Doyne, and *Macrae*, for the Respondent.

1888
April 21

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

The zemindar of *Madgole* died on the 25th of December, 1875. He left two widows, but no male issue. On the 8th of November, 1876, the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption, and also on the

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ground that the adoption was invalid by Hindu law, because the infant who was adopted was the only son of his natural father.

The question of Hindu law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision, of this Board, it may be as well to state that the learned counsel on both sides informed their Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this:—On Monday, the 20th of December, 1875, the zemindar verbally authorized the senior Rani to make an adoption; on the following day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at *Vizagapatam* intimating the fact of his having executed a will to that effect. Each of these allegations was traversed by the junior widow.

Apart from the matters directly at issue, the circumstances of the case are not in dispute.

The zemindars of *Madgole* belonged to a family of some antiquity, with pretensions to a mythical descent. In token of their descent they used the badge or emblem of a fish on their banners, and on the seal of the zemindary, and they were in the habit of authenticating documents by a drawing intended to represent the same device, and called the Matsia Santikam, or fish signature.

The late zemindar succeeded to the family estate in 1833. The property was then much embarrassed. It became still further involved during his tenure. The principal creditor was the Maharajah of *Jeypore*, who was in possession as mortgagee. A person of the name of *Lakshmaji* was the zemindar's muktiar, and he received a similar appointment from the Maharajah. In 1875 *Lakshmaji* took a lease of the zemindary. The control of affairs was thus in his hands, and all the officials of the estate were under his orders. *Lakshmaji* is said by the High Court to have been a clever but unscrupulous person. Probably this statement does him no great injustice. At the date of the judgment of the

High Court he appears to have been undergoing a sentence of imprisonment for forgery.

For some thirteen years or more before his death the zemindar was a helpless cripple from rheumatism. He became seriously ill about a month or six weeks before he died. In a letter from the Sub-Magistrate to the Collector of *Vizagapatam*, dated the 25th of December, 1875, announcing the zemindar's death, it is stated that he had been bedridden for three days before the 21st, "owing to excessive heat, swelling of the body, and diarrhœa, and the weakness resulting therefrom." On Monday, the 20th of December, he was seized with a violent attack of vomiting, and it is said that "the burning in his limbs increased largely." Under that attack, from which he never rallied, he sank on Saturday, the 25th of December.

There seems to have been among the zemindar's dependants a faction opposed to *Lakshmaji*, and, nominally at any rate, in the interest of the senior Rani. The head of this faction was one *Gopala*, an illegitimate brother of the zemindar. As the illness of the zemindar increased and his death was evidently approaching *Gopala's* faction grew bolder, and there were disturbances between the adherents of *Gopala* and those of *Lakshmaji*. The Sub-Magistrate was informed that rioting was apprehended. On the evening of Friday, the 24th of December, the Sub-Magistrate received a summons from *Gopala*, requesting him to enter the fort where the zemindar resided and quell a disturbance. He went there accompanied by the inspector of police. On entering the fort, *Gopala* took him to the senior Rani, who was in her husband's room. The Rani exclaimed, "This is just the time for preserving the Matsia race," and told one of the servants to bring "that paper." A paper was brought and placed in the hand of the Rani, who gave it to the Sub-Magistrate, saying it was the will of the Rajah. The Sub-Magistrate went up to the zemindar to ask him if it was so. The zemindar's eyes were open. He seems to have made an effort to speak, but failed. He gave no sign with his hands or with his head. The Sub-Magistrate then had the document read aloud. When the will was read out *Lakshmaji* said, "Rajah did not execute it. It is a forgery." The Sub-Magistrate then sealed up the zemindar's property as far as was

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practicable. He tried to find the seal of the zemindary. The Rani said it was with *Lakshmaji*. *Lakshmaji* denied that he had it. The Sub-Magistrate then went to the house of the manager *Narasimham*. He was examined in the absence of *Lakshmaji*, and he stated that he had sent the seal to *Lakshmaji* three or four days before. The seal, however, could not be found, and it has not been discovered since. The Sub-Magistrate took possession of the document which was represented to be the zemindar's will, and sent it on the following day to the Collector. There is no doubt that it was produced at the trial in the same state in which it was on the night of the 24th of December. It is sealed with the seal of the zemindary, and also bears the fish signature. It purports to be attested by twenty witnesses, and to be subscribed by one *Lingaya* as the writer of the document.

The zemindar did not recover consciousness, and died as already stated on the 25th of December.

In March, 1876, the alleged will was presented for registration. In support of the application thirteen witnesses, of whom the senior Rani was not one, were examined. The Acting Registrar refused registration. Among the reasons which he gave for the refusal, he referred to the discrepancies in the evidence of the witnesses and to their demeanour. On that occasion the witnesses who deposed to the execution stated that the zemindar sat up and signed the document in their presence. They did not, they said, see it sealed or delivered to the senior Rani, but they understood that it was sent to the manager to be sealed, and that it was afterwards delivered to her.

An appeal was presented from the decision of the Acting Registrar. In view of this appeal the senior Rani was examined herself. Her statement was this:—On Monday, the 20th of December, her husband was in a critical state. She went into his room about 9 A.M. She asked, "What is to be my fate? I have no children, and what is to become of me?" He told her to make one or two adoptions, to reign over the country, protect the second wife and concubines just as he did, and conduct the administration. On Tuesday, about 3 P.M., at the time of meals, he gave her the will. No one was in the room at the time but herself and the Rajah. On the very day he gave her

the will he said he had sent either a will or a letter to the Collector. He signed the will in her presence, and also smeared the ink on the seal, and affixed the seal himself. No one attested the will while she was there. She took the will and left it in her box for three days, and gave it to the Sub-Magistrate on the Friday.

After this evidence was given the appeal from the Acting Registrar's decision was allowed to drop. The Rani's statement to Mr. *Goodrich*, the Acting Collector, who made inquiries into the matter at the instance of the Board of Revenue, in July 1877, was that she was advised that it was unnecessary to establish the genuineness of the will, as the zemindar had given her authority to adopt. Mr. *Goodrich's* report was put in evidence by the Rani. It may be observed, in passing, that Mr. *Goodrich* remarks,—"Unfortunately, there has been keen contention all through the business; many have changed sides, some more than once; and the amount of perjured evidence at the disposal of each faction has been great."

In October, 1877, the Governor in Council directed the Board of Revenue to intervene, in their capacity of Court of Wards, for the protection of the rights of the two widows, who were registered as proprietresses of the *Madgole* estate.

In December, 1879, the junior widow was relieved from the guardianship of the Court of Wards.

This suit was instituted on the 8th of August, 1881. The senior widow and ten other persons, four of whom had been witnesses in the registration proceedings, were examined for the defence. The senior widow was the first witness. Her account of the conversation on Monday was much the same as that which she gave on the former occasion, except that she placed the conversation at 2 jhams or 12 o'clock, and said that when she went to her husband's room there were males in the room, who were ordered to leave, and she added that the people outside could have heard her conversation with her husband, and that the interview ended by her husband saying, "You had better go now. I shall execute a will to-morrow and give you." As regards the interview on Tuesday, she adhered to her statement that she went at 3 jhams, or 3 o'clock, to see her husband, at meal time, and

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that her husband both signed and sealed the will in her presence. She added that she stayed alone with her husband about an hour, talking over their past griefs and joys.

The room in which the sick man was lying was an apartment without windows. The door opened into a verandah 3 cubits wide. The room is said to have been about 7 or 8 cubits wide, and 10 or 18 cubits long from north to south. The cot on which the sick man lay was close by the southern wall.

Several witnesses speak to being in the room on Monday when the Rani came in. They say they went out, sat down on the verandah, and heard the whole conversation. The persons outside were about twenty in all. After the Rani left, the sick man repeated the conversation to them, and they congratulated him on having authorized his wife to make an adoption. He told them he was going to execute a will on the following morning, and asked them all to come quickly. Accordingly they came. *Lingaya* was among the first to arrive. The zemindar handed him a draft, and told him to copy it. He was about an hour copying. He did not know in whose handwriting the draft was. It was in the handwriting of some *Madgole* man. When the will was copied it was read out once or twice, and then the zemindar sat up and signed it, and handed it back to be witnessed by those present. While the will was being signed the zemindar dictated a letter to the agent of the government at *Vizagapatam*. It was written by *Venkenna*, not by *Lingaya* the writer of the will. When the letter was finished, it was handed to the zemindar, and then the Rani came in. Those present then left the room. Some went away at once; others waited in the verandah for about an hour. During that time they were not peeping in. Then they peeped through the door, which was ajar about a span, and just at that moment it happened that the zemindar called for his seal. It was taken from his box. He signed the letter. He sealed the letter and the will, and gave the will to the Rani.

Such, in substance, is the account given by the witnesses for the defence on whom the learned counsel for the Respondent relied. On the other hand, there are witnesses for the defence from whose evidence it may be collected that a person standing at the door of the sick man's room could not see him where he

was lying; that nobody peeped through the door, and that, in fact, it was not possible to do so, and also that the conversation could not be heard outside, that the sick man's voice was feeble, and that the Rani spoke low. And it is to be observed that *Narasimham*, the manager, ninth witness for the defence, who does not seem to have had any motive for stating that which was untrue, says that he saw the zemindar daily from the 20th to the 24th of December inclusive, and he adds, "I did not get any papers signed by him. He was too weak to transact business or to sign papers during those days. His hand was swollen. He postponed signing chitta for a fortnight as he could not sign."

Taking the evidence of the accepted witnesses, there are discrepancies to which the Subordinate Judge has perhaps attached too much importance. There are contradictions of more importance between the statements made by *Lingaya*, *Venkenna*, and a third witness, *Bhupala Raj*, in this suit, and their former depositions, which were put in evidence. The account of the transaction adopted by the learned counsel for the Respondent presents many improbabilities. The story of the assembly in the sick man's room on Monday morning, of the persons present going into the verandah and hearing there the conversation between the zemindar and the Rani, and the zemindar's promise to execute a will on the following day, seems improbable. It is not a little remarkable that there appears to be no trace whatever of this story in the evidence given on the registration proceedings. It is also remarkable that the time of the Rani's visit to her husband on Monday is now placed much later in the day than it was in her evidence in 1876. In 1876 the visit is stated to have taken place at 9 A.M., a time at which it is not likely that the zemindar would have had visitors, if one may judge from what is said to have occurred on the following day. People were asked, it is said, to come early on the following day to witness the will, and yet no one seems to have come before 10. The account of the scene when the will is said to have been copied, signed, and attested also seems improbable. It is improbable that a person admittedly in the state in which the zemindar was should have been able to trace the fish signature with his own hand and to take so active a part in the transaction,—sitting up without

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assistance, giving directions, and, above all, dictating a letter of some length to the Collector, which explained his will as regards adoption, and asked the favourable consideration of the Government. It is most improbable that this scene, for which arrangements were openly made the day before, should have gone on for so many hours without attracting the notice of *Lakshmaji*, who is said never to have left the fort during the zemindar's illness, and to have kept a vigilant watch on the proceedings of the opposite faction.

But these improbabilities are trifling compared with the improbability presented by the document itself, and by the circumstances under which it was first introduced on the stage.

The alleged will is a remarkable document. It is clear and concise, and singularly well arranged. It provides for many things besides providing for adoption, which is said to have been the reason for its execution. It provides for an allowance for the second wife, for the testator's daughter, for his concubines, and, above all, it provides for placing the administration of the estate in the hands of *Gopala*. Now *Gopala*, as we know from the statement of the senior Rani herself, was in disgrace at the time. She says, in her final examination, "At the time of the Rajah's death *Gopala Bhupati* was banished from the fort. It was the Rajah himself who precluded him from coming into the fort." In the judgment of the High Court it is stated that he had not been allowed access to the palace for some years. Whether this statement be founded on an admission at the hearing or not, *Gopala's* banishment, as it was the act of the zemindar himself, must in all probability have occurred before the zemindar's last illness. It is almost incredible that the zemindar could have meant to commit the management of his estate to a person whom he had himself banished from his presence. Then there is nothing in the evidence to shew that the dispositions in the alleged will emanated from the mind of the alleged testator, or that he had anything whatever to do with the instructions from which the will was prepared. *Lingaya* says that he wrote the will on the Tuesday morning from a draft handed to him by the zemindar. The draft is not forthcoming, which is perhaps not to be wondered at. But the person who wrote the draft, who is said to have

been a *Madgole* man, is not produced. No one seems to know who he was. As the zemindar could not leave his room, the writer must have come to the zemindar. There could have been no difficulty in finding the writer, and it is to be observed that the will was challenged as a forgery when first it was produced, and that *Lingaya* was questioned as to the writer of the draft on his first examination in 1876, so there can be no ground for suggesting that this point, which is obviously of the utmost importance, comes as a surprise to the supporters of the will. Again, there is nothing to shew that the zemindar had anything to do with procuring the seal from the manager, in whose custody it was until three days before the death. It seems to have been obtained from him by a trick. Two messengers were sent for the seal. They each said the zemindar wanted the seal, and that *Lakshmaji* was with him at the time. It was given to the second man, because his story corresponded with that of the first. The second messenger is said not to be alive, but there was no suggestion that the first messenger was dead, and he is not produced.

On the whole, therefore, the irresistible inference seems to be that the alleged will, whether it was prepared before or after Monday the 20th, was not prepared by the instructions of the zemindar, and that the seal by which it purports to be authenticated was not procured from the manager by the zemindar's directions.

Under these circumstances, their Lordships are of opinion that it would not be safe to rely on the oral evidence as proof that the document propounded by the Respondent does contain the last will and testament of the deceased. The burden of proof rests with the propounder of the will, and, in their Lordships' opinion, the Respondent has not discharged that burden. In their opinion, no reliance can be placed on the alleged conversation on Monday, or on the letter which is said to have been signed by the testator on the 21st, but which, from a pencil memorandum upon it, does not appear to have been received until after the zemindar's death. It was for those who produced that letter to give an explanation of the date indorsed if they meant to contend that that date was not, as it presumably was, the date of receipt.

In the result, their Lordships agree with the findings of the

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Subordinate Judge, though much of his reasoning appears to be far fetched and ill founded. In particular, there seems to be no ground for his strictures upon the conduct of the Sub-Magistrate.

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and that the Respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge, whose judgment will be restored except as regards the payment of costs. The Respondent must pay the costs of the appeal.

Solicitor for Appellant: *R. T. Tasker.*
Solicitor for Respondent: *Solicitor for India Office.*

J. C.* 1888 *April* 26, 28; *June* 23.

KALI KRISHNA TAGORE . . . . . PLAINTIFF.

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res judicata—Act XIV. of 1882, *s.* 13.

Estoppel by judgment results from a matter having been directly and substantially in issue in a former suit, and having been therein heard and finally decided. In order to see what was in issue the judgment must be looked at; the decree is usually insufficient for that purpose.

Where the decree in a former suit as explained by the judgment was to the effect that the plaintiff was not entitled in that suit to the relief prayed for, and was not then entitled to possession of the property claimed:—

Held, that a subsequent suit for possession was not barred thereby under sect. 13 of Act XIV. of 1882.

APPEAL from two decrees of the High Court (March 4, 1885) which in effect dismissed the Appellant's suit. One of them dismissed the Appellant's appeal from a decree of the Subordinate Judge of *Backergunge* (Aug. 20, 1883); the other allowed the appeal therefrom of the Respondent *Moulvi Syed Moazzam Hossein Chowdhry.*

The facts are stated in the judgment of their Lordships.

* *Present*:—LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

Mayne, and *Arathoon*, for the Appellant, contended that the High Court was wrong in holding that the decree of the Subordinate Judge of *Backergunge*, dated the 23rd of February, 1882, in a former suit by the same Plaintiff against the Respondent *Moulvi*, operated as an estoppel. That decree should be read with the judgment on which it was founded. As regards the lands marked D, that is so much of the lands then in suit as were settled as excess lands of *Chotua* with the Respondent, the Subordinate Judge gave as his reason for dismissing that portion of the claim that so long as a certain order of the Superintendent of the Diara Surveys remained in force and was not set aside the Plaintiffs' right to those excess lands must be considered as either extinguished or in abeyance, and consequently that he was not then entitled to recover them. There was therefore no final decision, but a decision that they could not be recovered in that suit. The decree itself is in terms to that effect and more fully explained by the judgment. Reference was made to Act XIV. of 1882, sect. 13; Act X. of 1887, sect. 13; Act XII. of 1879, sect. 6.

Doyne, and *Branson*, for the Secretary of State, contended that the Plaintiff's suit was barred by the decree of the 23rd of February, 1882, as *res judicata*. The Plaintiff put forward in the former suit the same claim as respects the lands marked D that he does in this suit. The defence was that it was necessary to make the Government a party. He might have applied to make the Government a party, or he might have applied to abandon that part of the claim with liberty to bring a fresh suit. He did neither the one nor the other, and his suit was dismissed. The Court was competent to give relief in that suit and refused. No new circumstances have arisen since giving the Plaintiff a new title. The test is not whether the title then put forward was finally adjudicated upon, but whether it was in fact put forward, and might have been so adjudicated upon: see explanations to sect. 13 of Act XIV. of 1882. The claim now made was then put forward, the Court declined to adjudicate, and the Plaintiff did not take that step which would have induced the Court to proceed, nor did he obtain a reservation of his right to sue again.

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Mayne replied.

1888. June 23. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal in a suit brought by the Appellant against the Secretary of State for *India* in Council (represented by the Collector for the district of *Backergunge*), and *Moulvi Syed Moazzam Hossein Chowdhry*, to obtain possession of about 300 bighas of land, described as marked D in a map prepared by the Civil Court amin in a previous suit, being re-formation on the original site of the Plaintiff's zemindary, and to have it declared that the proceedings and orders in connection with the diara revenue survey of the disputed lands, by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the Defendant *Hossein Chowdry*, could not stand against the Plaintiff's right, and were not binding on him.

The written statement of the Collector of *Backergunge* denied that the land in dispute was a re-formation on the original site of the Plaintiff's land, and asserted that it was not included in the old thakbust or survey boundaries as Plaintiff's estate. It also stated that the boundary between the Plaintiff's land called *Gopalpore* thakked in No. 1585, and the Defendant *Moazzam Hossein's* land called *Chotua* thakked in No. 1625, was not a line during the time of the thakbust or survey measurement, but a big and navigable done (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law; that the land in dispute was formed by the drying up of the big and navigable done which existed at the time of the first survey between *Gopalpore* and *Chotua*, and as such was assessable as surplus under the existing law. *Moazzam Hossein* in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as re-formation on the original site of his lands.

The Appellant and *Moazzam Hossein* are proprietors of two contiguous estates, viz., *Nazirpore* and *Saistabad* respectively.

Some time before 1842 considerable portions of these estates were diluviated by the river *Arial Khan*. On the reappearance of the land, in the shape of five churs separated from each other by dones, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an amin named *Sumbhu Nath* was deputed by the Collector to make over to the proprietors the different portions of the re-formed land appertaining to their estates. In 1842 the amin, after making a measurement of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors. The lands assigned to the ancestor of *Moazzam Hossein* were named chur *Chotua*, and those released to the Appellant's father, *Gopal Lal Tagore*, were called chur *Gopalpore*. Some years after, but it is not clear when, the river again changed its course, and, flowing through *Chotua* and *Gopalpore*, washed away portions of those two mouzahs. In 1868 a thak survey was made and after that the river gradually receded towards the east, and is now flowing through the Appellant's land of *Gopalpore*. The land in dispute, which the Appellant claims, is the newly formed land on the west of the river, in contiguity with the lands of *Chotua*. After this last re-formation the western portion of the land in dispute, together with some other land, was measured by the diara survey authorities in 1879 as excess lands of *Chotua*. *Moazzam Hossein* objected to this, and claimed the land as re-formations on the site of the diluviated land of his mouzah *Chotua*. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouzah. In 1881 the Appellant sued him for this and other lands, and he pleaded that the land claimed was a re-formation of the diluviated land of *Chotua*, and also claimed to hold as before of the Government. An issue was settled, "whether the land in dispute is a re-formation on the site of the Plaintiff's chur *Gopalpore*, or on the site of the land of chur *Chotua*, released to the Defendant." The Court found this issue in favour of the Plaintiff (the present Appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the Plaintiff's right to the portion of the

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disputed land measured as surplus accretion to *Chotur*, and settled with the Defendant, must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it *now*." It was ordered that the Plaintiff should recover possession of a portion of land described by reference to a map prepared by the amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

By the Act IX. of 1847, "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction in the provinces of *Bengal*, *Behar*, and *Orissa*," it is enacted that the Government of *Bengal*, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgment in this suit that, on comparison of the thak and survey maps by the Civil Court amin it has been found beyond doubt that the land in dispute was then thakked as part of the Plaintiff's mouzah *Gopalpore*, and that the assertion of the Defendants to the contrary was erroneous. And he held the map to be an admission by the Government of the Plaintiff's title. It could not be disputed that it made a *primâ facie* case against the Government. However the case of the Appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of *Moorshedabad* and *Calcutta*, dated the 15th of December, 1841, contains a history of the proceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and on an appeal from his decision it was set aside by the Special Commissioner, and it was

ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers should be released from the claim of the Government.

In October, 1842, *Sumbhu Nath*, the amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands, made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land, and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports is the following passage:—"The measurement by *Anund Chunder Mookerji* and *Joychunder Chatterji*" (a measurement made in the year before the decree of the Special Commissioner) "shews that there were 20,391 bighas 13 cottahs of land inclusive of *done* in the five plots of chur. The lands in those five plots of chur, inclusive of khal and *done*, amount by my measurement to 21,152 bighas 10 cottahs 9 dhoors of land in all, and so there is an excess of 760 bighas 17 cottahs 9 dhoors of land measured by me in the five plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the Appellant's ancestor *Gopal Lal Tagore*, he says including khals and dones. Thus the dones appear to have been included in the plots. In the record there is a document described as the measurement chitta of the lands in five plots of chur included in the *Haria* and *Chaola* rivers, being the subject of dispute between the Government and *Gopal Lal Tagore* in Cases Nos. 1474 and 1555 pending trial. In several places a done is mentioned as included in the quantity of land. In the amin's sketch map which accompanied the reports the done in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of *Nazirpore*. The description of Dag. 15 in the chitta is north of the lands formed by alluvion after diluvion of mouzah Kala (worm-eaten), to which the Appellants Kumla D (worm-eaten), and others named in the Decree No. (worm-eaten), are entitled east of Dag. 8, west of the done to the west of the 5th plot and south of the lands of Jharna *Bhanga* chur, 4th plot." Thus, on the opposite side to where the done in question was situate, we have a done between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the done, is given as the boundary, and in the

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description of Dag. 8 it is said to be west of the 4th plot. In the summary of the land of *Nazirpore*, the zemindari of *Gopal Lal Tagore*, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed "waste land, with done." It appears to their Lordships that in 1842 the whole of the land and water within the ambit of the five plots or churs was measured and released by the Government, and no part of the dones was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the done which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by *Sumbha Nath*, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree against the Secretary of State, and made a decree, which was unnecessary, that the Appellant should recover possession of the land of which possession was decreed in the former suit. The present Appellant and *Moazzam Hossein* both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgment upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the Plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. Whatever were the reasons which led the Lower Court to take that course and not to grant the Plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the parties, and is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree, . . . it must be treated as a decree binding as between him and the second Defendant, the effect being that there is no claim against the Defendant in respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate

Judge, it being clear that he only intended to decide that the Plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in sect. 6 of Act XII. of 1879, and sect. 13 of Act XIV. of 1882. It is that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not shew on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the Plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the Defendant in respect of the property.

Upon the question whether the Plaintiff was entitled to any relief as against the Secretary of State, the High Court having thus decided as to the estoppel considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the Appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present Appellant to the High Court was dismissed, and that of *Moazzam Hossein* in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the Plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and make a decree awarding possession to the Plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession, or until the expiration of three years from the date of the decree, whichever first occurs.

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As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the Plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason for the costs of this suit in the Subordinate Court not being now awarded to the Plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitor for Secretary of State: *Solicitor, India Office.*

HARI SARAN MOITRA . . . . . PLAINTIFF; J. C.*

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BHUBANESWARI DEBI (FOR SELF AND AS GUARDIAN OF HER MINOR SON JOTINDRA MOHUN LAHIRI) AND NILCOMUL LAHIRI . . . . . DEFENDANTS. *March* 8, 10, 13, 14; *April* 21.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Suit against Hindu Widow as representing her Husband's Estate —Rights of Minor Adopted Son—Guardianship.

A decree against a Hindu widow as representing her husband's estate binds her minor adopted son, and after the adoption the appeal, being for his benefit, must be considered as prosecuted on his behalf even though he is not made a party thereto.

Dhurm Das Pandey v. *Mussumat Shama Soondri Dibiah* (3 Moore's Ind. Ap. Ca. 229) followed.

So *held*, where title was in dispute. There may also be a decree for mesne profits against a minor who is not a party if it appear that it is substantially against him though formally against his guardian.

Suresh Chunder Wum Chowdhry v. *Jagut Chunder Deb* (Ind. L. R. 14 Calc. 204) approved.

CONSOLIDATED APPEALS from two decrees of the High Court (June 9 and 10, 1884) passed on appeal from two decisions of the Subordinate Judge of *Rungpore*, both dated the 10th of January, 1882.

Of those decisions, one was in a case preferred by the Appellant for the execution of a decree which he had obtained from the High Court on the 22nd of December, 1874, and which had been confirmed on appeal by the judgment of the Judicial Committee of the 12th of November, 1880, for possession upon title of a one-fifth share of certain lands which had formed the joint family estate of the parties hereto.

The other judgment appealed from was given in a suit which the Appellant, after he had obtained that decree for possession,

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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had instituted on the 12th of April, 1881, for the mesne profits of the share to which his title had been established in the previous suit.

In the High Court (McDonell and Field, JJ.) the minor's appeal was allowed in the execution case, and it was held that as he had not been brought on the record by the Plaintiff the decree could not be executed against him. It was decreed that the order of the Lower Court be varied by granting to the decree-holder possession jointly as against both the judgment debtors, *Bhubaneswari Debi* and *Nilcomul Lahiri*, of an undivided share of 3 annas and 4 gundahs in every plot of the land in dispute.

As regards the suit for mesne profits the Subordinate Judge held that the liability of the judgment debtors should be separately assessed, as they had been in separate possession of parts of the properties in question, and also because it would prevent further litigation between them. In the High Court the widow's appeal was allowed, and the suit was dismissed as against her, both in her personal capacity and as guardian for her minor son, on the ground that no decree had been made against her in the former capacity, and that none could be made against her in the latter, as she had not been made guardian *ad litem*, and the minor was not a party to the suit.

Nilcomul Lahiri's appeal was allowed, so far as to vary the decree of the first Court and reduce his liability for mesne profits to the extent in which he appeared to have held a share of the estate in excess of that he was entitled to, and *pro tanto* to have possessed any part to which the Plaintiff was entitled—*i.e.*, to the extent of the 2 gundahs which he held in excess of the share of 6 annas and 8 gundahs to which he was entitled. The calculations of the Subordinate Judge as to mesne profits being adopted, it was found that this Respondent was thus liable for Rs.475, which, with interest thereon from the date of suit at 6 per cent. per annum, he was ordered to pay.

Muyne, and *C. W. Arathoon*, for the Appellant, contended that the High Court should have held that the minor was in reality a party to the suit, and that relief was substantially prayed as against him. Even if he was not properly described as a party,

still, having regard to the form of the plaint and pleadings, and that the parties to the suit treated the suit as though it were against him personally, and the Subordinate Judge allowed the suit to proceed, being satisfied that the mother properly represented her son, the High Court ought not to have given effect to a mere formal defect, but should have regarded it as cured by the action of the Court and of the parties. Reference was made to *Ischan Chunder Mitter* v. *Buksh Ali Soulayar* (1); *The General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* (2); *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (3); *Hunoomanpersad Panday* v. *Mussamut Babooee Munraj Koonweree* (4); *Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore* (5). This was substantially a decree against the person for the time being entitled to the property: *Jairam Bajabashet* v. *Joma Kondia* (6). The minor was substantially a party, but even if he were not the decree-holder under the circumstances could proceed to execution, leaving him to object: *Kisansing* v. *Moreshwar* (7); *Komulchunder Sen* v. *Surbessur Doss Goopto* (8); Act X. of 1877, s. 443; *Jogi Singh* v. *Kunj Behari Singh* (9); *Alim Buksh Fakir* v. *Jhalo Bibi* (10); *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb* (11). [SIR BARNES PEACOCK referred to *Doorga Persad* v. *Kesho Persad Singh* (12).] The decision of the Subordinate Judge was on the evidence correct, both as to the award of mesne profits and the manner in which possession should have been given to the Appellant.

Doyne, for the Respondent, *Nilcomul Lahiri*, contended that, having regard to the extent of the Appellant's right to possession under the decree of the High Court dated the 22nd of December, 1874, such right was fully satisfied by the decree under appeal. The Appellant has not made out any claim against *Nilcomul* for more than a 3-annas 4-gundahs share of all the rents of the immoveable properties in suit. The High Court was also right in

(1) Marsh. 614.
(2) 14 Moore's Ind. Ap. Ca. 605.
(3) Law Rep. 6 Ind. Ap. 233.
(4) 6 Moore's Ind. Ap. Ca. 393.
(5) Law Rep. 11 Ind. Ap. 66.
(6) Ind. L. R. 11 Bomb. 361.
(7) Ind. L. R. 7 Bomb. 91.
(8) 21 Suth. W. R. 298.
(9) Ind. L. R. 11 Calc. 509.
(10) Ind. L. R. 12 Calc. 48.
(11) Ind. L. R. 14 Calc. 204, 214.
(12) Law Rep. 9 Ind. Ap. 27.

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limiting *Nilcomul's* liability for mesne profits to that share of the estate which he had held in excess of what he was legally entitled to. He was not jointly liable with the minor or the widow. If he were liable jointly with the minor, then, so far as the Appellant might be correctly held to have lost or abandoned his right against the minor, he had also abandoned it against the estate of the minor.

Biale, for the widow *Bhubaneswari Debi* and her minor son, contended that neither was liable, the minor as not being represented by a guardian *ad litem*, the widow as neither representing the minor nor having any personal liability of her own. The minor was in no sense a party to the suit, and the whole liability for mesne profits should be thrown upon *Nilcomul*. See Act X. of 1877, sect. 372, and Act XL. of 1858, sect. 3. [SIR RICHARD COUCH referred to *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb* (1) and *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (2).] On the merits the rights of the Appellant to possession were fully satisfied by the decree under appeal.

Mayne replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

In 1870 *Uma Soondari Debi*, the mother of the Appellant, and daughter and heiress of *Raghumoni*, who was one of five brothers, sons of *Roma Nath Lahiri*, forming a joint Hindu family, brought a suit against *Bhubaneswari Debi*, the widow of *Shib Nath*, one of the brothers, who had managed the family property, *Nilcomul*, the son of *Koli Mohun*, another brother, and *Kanaktara*, the widow of *Krishnamoni*, another brother. These were the only members of the family who were then alive, *Ram Mohun*, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit *Uma Soondari* claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal properties. Schedule

(1) Ind. L. R. 14 Calc. 204, 214. (2) 3 Moore's Ind. Ap. Ca. 229.

No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the family were living in commensality. On the 13th of December, 1872, the Subordinate Judge of *Rungpore* made a decree in favour of *Uma Soondari* in respect of part of the share which she had claimed. Thereupon *Bhubaneswari*, *Uma Soondari*, and *Nilcomul* separately appealed to the High Court, which, on the 22nd of December, 1874, made a decree in the following terms:—"It is ordered and decreed that the decree of the Lower Court be varied, and in lieu thereof it is hereby decreed and declared that the Plaintiff is entitled to 3 annas and 4 gundahs share (the share claimed) of all the property which is named and described in the two schedules appended to the plaint." And *Uma Soondari* having before the suit been put in possession of 2 annas of the property named in and described in the first schedule, it was ordered and decreed that she should recover from the Defendants possession of the remaining 1 anna and 4 gundahs, and possession of 3 annas 4 gundahs of the property named and described in the second schedule. Thereupon *Bhubaneswari* appealed to Her Majesty in Council, who, by an Order in Council, made on the 20th day of November, 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, *Bhubaneswari* adopted a son, *Jotindra Mohun Lahiri*, but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th of April, 1881, *Uma Soondari* having died, the Appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against *Bhubaneswari* for self and as guardian on behalf of the minor *Jotindra Mohun Lahiri*, and against *Nilcomul Lahiri*. Execution was not sought against *Kanaktara*, who was said in the judgment of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April, 1881, the Appellant brought a suit in the same Court for mesne profits, naming as the Defendants *Bhubaneswari Debi*, for self and as guardian and

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executor of *Jotindra Mohun Lahiri*, minor, and *Nilcomul Lahiri*. The Subordinate Judge, on the 10th of January, 1882, gave judgment in both cases, referring in one judgment to the other where the question appeared to him to be the same. The judgments will be more conveniently stated hereafter. In the execution case *Jotindra Mohun*, by his next friend, *Rudra Chunder Roy*, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shewn to have obtained any authority to act as next friend of the minor, and is said to have been a servant of *Bhubaneswari*. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. *Nilcomul* also appealed, and *Hari Saran Moitra*, the present Appellant, filed objections by way of cross appeal. In the suit for mesne profits both *Bhubaneswari* and *Nilcomul* separately appealed.

On the 9th of June, 1884, the High Court gave judgment in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgments.

In the execution case there are three questions: 1, whether execution can be had against the minor personally or against *Bhubaneswari*; 2, whether the pucca buildings and moveables are to be included in the execution; 3, whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said:

"Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree-holder's suit for wasilat, No. 26 of 1881. The question being similar, the same judgment should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. *Bhubaneswari*, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the suit No. 26, *Bhubaneswari* was a

Defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to on behalf of her minor son. The minor is also under her guardianship and protection. *Bhubaneswari* is, therefore, the proper person to represent the minor, and I do not think it equitable that *Rudra Chander Roy*, almost a stranger, should be allowed to [illegible] behalf of the minor when his connection is far remoter than that of *Bhubaneswari*, who protects the minor, and is his nearest kindred as the adoptive mother."

On the same question the High Court said:

"The present appeal arises out of proceedings taken in execution of the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor *Jotindra Mohun Lahiri*, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken. Sect. 372 of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a Defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been urged that the devolution of the Defendant's interest upon the adopted son by reason of the adoption was not known to the decree-holder, and that therefore he could not take the necessary steps to make the minor a Defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgment. The Code of Civil Procedure referred to must be Act X. of 1877, as sect. 372 of the previous Code relates to special appeals. Act X. of 1877 came into force on the 1st of October, 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under sect. 372, it appears to their Lordships that the

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question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood. The Court say, "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record." In the suit for mesne profits, where *Bhubaneswari* was sued as widow for self and as guardian on behalf of the minor, they say, "Now there can be no doubt that making a person's guardian Defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for mesne profits. The decree in the original suit was sought to be enforced against *Bhubaneswari* personally and as guardian of the minor. So far as he was concerned the sole question was whether the decree bound him. If it did execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when *Bhubaneswari* was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which *Shib Nath* was in possession when he died. After the adoption it was for the interest of the minor that *Bhubaneswari's* appeal should be prosecuted, and the appeals of *Uma Soondari* and *Nilcomul* defended. *Bhubaneswari's* estate had been divested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her

Majesty in Council was not proper. In his judgment in the suit for mesne profits the Subordinate Judge says,—"In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with." If her appeal had been successful, *Bhubaneswari*, as the guardian of the minor, would have been kept in possession of the whole of what *Shib Nath* died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Panday* v. *Mussumat Shama Soondri Dibiah* (1), a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and, notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their Lordships said (2),—"All the facts, being stated, it is assumed as matter of law that, after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him." Their Lordships are of opinion that this principle is applicable in the present case, that the minor is bound by the decree in the title suit, and the High Court was in error in allowing his appeal in the execution case, which they have done by their decree in the Appeal No. 97.

The next question is as to the pucca buildings and moveables. The decree of the High Court in the original suit was,—"It is ordered and decreed that the decree of the Lower Court be varied, and in lieu thereof it is hereby decreed and declared that the Plaintiff is entitled to 3-annas and 4-gundahs share of all the property which is named and described in the two schedules appended to the plaint." The moveables were in a separate inventory, and it is now admitted that execution cannot be had in respect of them. As to the pucca buildings the Subordinate Judge said,—"I consider it to have been purely the intention of the High Court that, in awarding a decree in favour of the Plaintiff for a 3-annas 4-gundahs share of all the property which is named in the two schedules, only the landed property was

(1) 3 Moore's Ind. Ap. Ca. 229. (2) Page 243.

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meant, and decided upon without relevancy to the buildings or moveables." But as it had been contended that the decree literally included the buildings, he thought it equitable that the decree should be returned to the decree-holder for amendment in the proper Court, and then the execution be revised in conformity with the judgment. The judgment of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree-holder had taken no steps to have the original plaint made a part of the execution record, or to file a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a 2½-annas share of the landed properties stated in those schedules. The High Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, viz., what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgment, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the third question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the Appeal No. 126, the High Court decided that the decree ought to be executed by giving the decree-holder as against *Bhubaneswari* and *Nilcomul* a 1 anna 4 gundahs in the plots of which he already had possession of 2 annas and 3 annas 4 gundahs of the plots in which he had no possession. They

accordingly ordered, in the Appeals Nos. 125 and 126, that the objections or cross appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree-holder possession jointly as against *Bhubaneswari* and *Nilcomul* of an undivided share of 3 annas 4 gundahs in every plot of the land in dispute.

The learned counsel for the Appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the Appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that Appeal No. 125 should be dismissed with costs, and by allowing the Plaintiff's objections or cross appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

The action for mesne profits has now to be considered. In this the questions are—1, whether the liability was joint or several; 2, whether *Jotindra Mohun* was liable. In the title of the plaint the Defendants are stated to be *Bhubaneswari Debi*, widow of the late *Shib Nath Lahiri*, for self, and as guardian and executor of *Jotindra Mohun Lahiri*, minor, and *Nilcomul Lahiri*. The Subordinate Judge decided that the liability of the Defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1-anna and 4-gundahs share in the joint ancestral property which had been decreed in favour of the Plaintiff, $13\frac{3}{3}$-gundahs share was in possession of *Bhubaneswari*, and $10\frac{1}{3}$-gundahs share in the possession of *Nilcomul*. Accordingly he decided that, with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by *Bhubaneswari* "with the *bonâ fide* intention that

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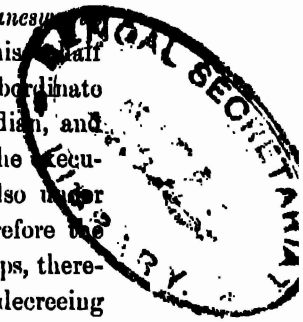
her husband's real rights had been interfered with," and inasmuch as it was for the interest of *Jotindra Mohun* that the suit was defended and the suit carried up to the highest tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs.5692. 7*a*. 2*p*., and ordered that the Plaintiff should recover from *Bhubaneswari*, as guardian on behalf of the minor *Jotindra Mohun*, Rs.3297. 10*a*. 2*p*., and from *Nilcomul* Rs.2394. 13*a*. Both *Nilcomul* and *Bhubaneswari* appealed to the High Court—the former on the ground that the Plaintiff was not entitled to recover from him the 10⅓-gundahs share, and at the most he was not liable to make good more than 2 gundahs, and *Bhubaneswari* on the ground that *Jotindra Mohun* was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgment deal first with this question. They say, "In the plaint the minor is not made a Defendant. The Defendants are *Nilcomul Lahiri* and *Bhubaneswari Debi*, as widow of the late *Shib Nath Lahiri*, and as guardian on behalf of the minor *Jotindra Mohun Lahiri*. Now there can be no doubt that making a person's guardian Defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. There is no excuse for ignorance as to the proper procedure in respect of minors, seeing that the provisions contained in the present Code of Civil Procedure became law nearly seven years ago, in 1877. A minor in order to be bound by the result of legal proceedings must be made a party to the suit in his own name." And after referring to the provisions for the appointment of a guardian *ad litem* they say: "No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to be bound by the decree."

In *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb* (1), a plaint in a suit described one of the Defendants thus, "*N. C.*, guardian, on behalf of her own minor son, *S. C.*," and it was held by a full bench of the High Court at *Calcutta* that, it appearing that the suit was substantially brought against the minor, and

(1) Ind. L. R. 14 Calc. 204.

the error of description in the plaint being one of mere form, it could not, without proof of prejudice, invalidate a decree against him in the suit; also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit when it appeared on the face of the proceedings that the Court had sanctioned the appointment. Their Lordships are satisfied that the suit for mesne profits was substantially brought against the minor. The seventh issue decided by the Subordinate Judge contained the question whether he could be made liable when he was not a party in the former suit. And the grounds of appeal in *Bhubaneswari's* appeal to the High Court shew that she appealed on his behalf as well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgment in the execution case before quoted. He says: "The minor is also under her guardianship and protection, *Bhubaneswari* is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit should be dismissed as against *Jotindra Mohun*, and declaring that he was not a party to it and was not bound by the result of the proceedings.



In the appeal by *Nilcomul*, the High Court said that the Subordinate Judge did not find that *Nilcomul* was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundahs had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundahs was not asserted. It was also admitted in his written statement. They thought, therefore, that, except as regards the 2 gundahs, the Plaintiff had not proved that *Nilcomul* was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundahs, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that *Nilcomul* should pay, instead of the sum awarded by that decree, the sum of Rs.475 only, as mesne profits, with interest thereon

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from the 10th of January, 1882, the date of the decree of the Lower Court. The learned counsel for the Appellant did not object to this decision, nor did the learned counsel who appeared for *Bhubaneswari* and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which *Nilcomul* and *Bhubaneswari* have been in possession during the years for which mesne profits have been awarded shews an excess over their lawful shares at least equal to the share of which the Plaintiff has been wrongfully deprived. Consequently, if *Nilcomul* held only 2 gundahs, *Jotindra Mohun* would be liable for the mesne profits of the remainder, and the Plaintiff would be entitled to recover the balance of the total sum of Rs.5692. 7*a*. 2*p*. awarded for mesne profits from his estate. This would be Rs.5217. 7*a*. 2*p*. Therefore the decree of the High Court in the appeal by *Bhubaneswari* (Appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the Plaintiff do recover from *Bhubaneswari* as guardian on behalf of the minor, *Jotindra Mohun*, the sum of Rs.5217. 7*a*. 2*p*., with interest at 6 per cent. per annum from the 10th of January, 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in appeal No. 121 of 1882, so far as it relates to payment by *Nilcomul Lahiri* and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the Appellant to pay the costs of the Respondent *Nilcomul*, and that the Appellant's costs, but not including what he is ordered to pay to *Nilcomul*, be paid by *Bhubaneswari* as guardian on behalf of the minor.

Solicitors for *Hari Saran Moitra*: *T. L. Wilson & Co.*
Solicitors for *Nilcomul Lahiri*: *Gordon & Dalbiac.*
Solicitor for *Bhubaneswari Debi* and the Minor: *S. G. Stevens.*

HAIDAR ALI AND ANOTHER . . . . . APPELLANTS; J. C.*

AND 1888

TASSADDUK RASUL AND OTHERS . . . RESPONDENTS. July 21.

Ex parte SHAIKH HAIDAR ALI.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Revivor—Duty of Lower Court.

Where a revivor is sought of an appeal to Her Majesty in Council, the representative character of the persons to be substituted on the record for the party deceased should be proved in the Court below, whose duty it is to make a certificate on which their Lordships can act.

THIS was a petition of revivor by the Appellants consequent on the deaths of the Respondents, *Nawab Ali Khan* and *Ikram Ali*. It alleged that the heirs of the former were his minor son and daughters, whose names were given, and that the heirs of the latter were his mother, sister, wife, daughter, and brothers, whose names were also given; that four petitions had been presented to the Judicial Commissioner, the first by the Appellants for the substitution of the names of the heirs and for the appointment of a guardian *ad litem* of the minors; the second by the husband of one of the daughters of *Ali Khan* to be appointed guardian of the minors; the third by the first Respondent to the effect that the application was barred by lapse of time; the fourth by the manager under the Court of Wards of the property in suit praying that his name might be entered. The Judicial Commissioner held that his Court was *functus officio*, and had no power to act in the matter unless authorized to do so by the Privy Council. He therefore declined to make the order prayed for, but directed that the application and the objection should be printed and submitted to the Privy Council as a supplementary record.

Doyne, for the Petitioners.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C. 1888 HAIDAR ALI v. TASSADDUK RASUL.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

Their Lordships think it is quite impossible for them to make an order upon these materials for altering the record. They have not got the facts before them, and it is very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. *Macpherson's* Book. He says (page 241) :—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to *England* for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great number of years; and they now must request the Judicial Commissioner to follow that which is the ordinary practice, and to make a certificate or statement on which their Lordships can act.

Solicitors for the Petitioner: *Barrow & Rogers.*

MUSSAMAT BASSO KUAR AND OTHERS. . PLAINTIFFS;

AND

LALA DHUM SINGH . . . . . DEFENDANT.

J. C.*
1888
June 21;
July 7.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Limitation—Starting Point—Fresh Obligation under Indian Contract Act, s. 65—Failure of Title to retain Money under art. 97 of Act XV. of 1877.

The Respondent being indebted to the Appellant agreed to convey certain property to him, setting off the debt against part of the price. No money was paid, and disputes arising as to other terms of the agreement, the Respondent unsuccessfully sued to enforce it; being afterwards sued for his debt he pleaded limitation:—

Held, that the decree dismissing the Respondent's suit was the starting point of limitation. That imposed, under sect. 65 of the *Indian Contract Act*, a fresh obligation on the Respondent to pay his debt; in the alternative it imported, within the meaning of art. 97 of Act XV. of 1877, a failure of the consideration which entitled him to retain it.

APPEAL from a decree of the High Court (March 12, 1886), reversing a decree of the Subordinate Judge of *Saharunpur*, which was in favour of the Plaintiff.

The facts are stated in the judgment of their Lordships.

The only question in the suit was whether it was barred by limitation.

The opinion of the Subordinate Judge was as follows:—

"I am of opinion that the amount claimed is of the nature of a debt on account books. The sale-deed which was executed was, in consequence of the fact that it was not executed in accordance with the contract admitted by the two parties, declared to be defective, and the Plaintiff's right of revoking the contract was admitted by the High Court, and the Defendant's claim to have the sale completed and the sale-deed completely executed was dismissed. Hence the disputed amount of debt reverted to its original condition. The Plaintiffs are not right in stating that, according to sects. 64 and 65 of the *Contract Act*, this part of the

* *Present*:—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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consideration of the sale-deed was recoverable by the Plaintiffs. As to the plea of limitation, it may be observed that it is wrong. The Defendant, on the 3rd of August, 1880, instituted a suit for having this amount of debt set off against the consideration of the sale-deed. On the 14th of March, 1884, that claim was dismissed by the High Court on appeal. The Plaintiffs were, under sect. 12 of the Code of Civil Procedure, not competent to seek determination of this debt by means of a separate suit during the pendency of the above-mentioned suit, nor could the Court determine it separately. Therefore, for the period in which the Plaintiffs were taking proper steps against the setting off of the amount in question, an allowance should be made to the Plaintiffs in computing the term of the suit, and the benefit of exclusion of time provided in sect. 15, Act XV. of 1877, should, by reason of bar under sect. 12 (Civil Procedure Code), be given to the Plaintiffs."

The judgment of *Petheram*, C.J., in appeal, was as follows:—

"The only question which we have to determine is at what time did the debt become due.

"Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the Defendant to the Plaintiff of Rs.33,359 3*a*. 6*p*., that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The Defendant apparently was not in a position at that time to pay in money, but he had certain landed property, and negotiations took place for the sale of this property to the Plaintiffs, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the Plaintiff should pay this amount by giving credit to the Defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dispute arose as to what had been settled, as the actual terms of the bargain which were to be reduced into writing. The Defendant brought a suit against the Plaintiff for specific performance

of the contract, which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal, the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then Plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then Plaintiff, but was in fact the contract set up by the then Defendant, who is now Plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shews is that the contract set up in that suit was not proved because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in an agreement, and the original debt due by the present Defendant to the present Plaintiff always remained due, and is so still. It is alleged that the contract was completed on the 1st of September, 1879, and that is therefore the latest possible date we can look to in considering when the money came due. The whole amount had in fact become due before that date by reason of prior transactions, but, upon the view most favourable to the Plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th of September, 1884, that is to say, much more than three years from latest possible date upon which the debt can be said to have become due. Under these circumstances the suit is barred by limitation. The Plaintiff's contention is that the contract which he set up was found to have been completed, and under its terms this money having been credited in the present Defendant's books, was to be treated as a payment by the present Plaintiff as a deposit on account of the sale, and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court

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decided that the contract set up by the present Defendant was not, but that set up by the Plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself, which is now set up by the Plaintiff, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present Plaintiff's letter to the Defendant demanding payment of the money, and dated the 29th of September, 1879, the Plaintiff did not demand the money of the Defendant, or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to treat the money as anything but the old balance due from the Defendant to the Plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the Defendant a decree. The appeal must be decreed with costs."

Doyne, for the Appellant, contended that the Respondent on the dismissal of his suit for specific performance of the contract alleged by him became bound to repay the amount of the debt due by him to *Barumal*, which up to that time he had retained as part of the consideration of the alleged contract: see Act IX. of 1872, sect. 65. During the pendency of the suit brought by the Respondent for performance of the alleged contract, *Barumal* could not have prosecuted a separate suit for the recovery of the debt now claimed. In that suit the Respondent asserted a right to retain that debt. Till the determination of the Respondent's suit, *Barumal's* cause of action in respect of that debt was suspended. The Appellant was therefore entitled to the exclusion of the time occupied by that suit: see sect. 15, Act XV. of 1877. Moreover, the Appellant had a lien on the estate as against the Respondent to the extent of the Respondent's debt, which was regarded as part of the price paid by the Appellant in pursuance of his contract of purchase. Regarded in that light it was sufficient to support a lien: see *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Singh* (1).

[LORD SELBORNE referred to *Rose* v. *Watson* (2).

(1) 12 Moore's Ind. Ap. Ca. 275. (2) 10 H. L. C. 673.

C. H. Hill, for the Respondent, contended that the decree of the High Court was right.

No payment—nor anything equivalent thereto—was ever made by *Barumal* to the Respondent, either by way of deposit on account of the sale, or in respect of the purchase-money of the respondent's villages. Nor, until the present suit was impending, was it pretended by *Barumal* that the principal sum now claimed was anything other than the debt of Rs.33,359, due on the 1st of September, 1879. No act has been done, either by *Barumal* or by the Respondent, which would have the effect of altering the character of that debt, or the right in which it was claimable, or of affording a starting point for the running of the Statute of Limitation with respect to the appellants' claim, which would bring the present suit within the statutable period. If the Appellants allege a completed contract for the sale of the villages, other than that formerly asserted by the Respondent, the same is at variance with the case made in the plaint in the present suit, as well as with the contentions of *Barumal* in the suit formerly brought by the Respondent. Evidence has not been adduced on the part of the Appellants, to prove the existence or the terms of such other contract, and, as a matter of fact, no such contract existed, while, on the other hand, the High Court refused to allow the existence of the contract, as formerly asserted by the Respondent.

Reference was made to Act XV. of 1877, sect. 4, and schedule ii. art. 97, and to *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (1).]

Doyne replied.

1888
July 7.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The question in this case is whether a debt which at one time was due from the Respondent to one *Barumal*, whom the Appellants represent, and which has never been paid, has been extinguished by lapse of time. The High Court, differing from the Subordinate Judge, have decided the point against the Appellants, and have dismissed the suit brought by them for recovery of the debt.

(1) 13 Beng. L. R. 182.

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MUSSAMAT BASSO KUAR v. LALA DHUM SINGH.

Barumal and *Dhum Singh*, who were bankers in *Saharunpur*, had dealings together, and *Dhum Singh* came to owe *Barumal* Rs.33,359. 3*a*. 6*p*. It was then agreed between them that *Dhum Singh* should convey to *Barumal* or to his wife, *Basso Kuar*, certain villages for the sum of Rs.55,000, and that his debt should be set off against the price. On the 1st of September, 1879, he executed and delivered to *Barumal* a deed by which he acknowledged the receipt of the whole purchase-money, and conveyed the villages to *Basso Kuar*, and he indorsed on the deed a memorandum shewing that the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid.

On the same day *Barumal* took away the deed and signed a letter prepared by *Dhum Singh*, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stipulated, and, declining to complete the purchase, he demanded what was owing to him. *Dhum Singh* on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd of August, 1880 against *Barumal* and *Basso* for specific performance of the contract, praying that the deed might be registered, and that *Barumal* might be ordered to pay the balance of the Rs.55,000 with interest after setting off the debt of Rs.35,359. 3*a*. 6*p*.

On the 24th of February, 1881, the Subordinate Judge decided in favour of *Dhum Singh's* view, and gave him a decree according to his prayer. *Barumal* appealed to the High Court. After reviewing the evidence their conclusion was that *Dhum Singh* did not make out to their satisfaction that the sale deed ever became a contract binding on *Barumal*, and enforceable against him in law. They therefore dismissed his suit. Their decree was made on the 14th of March, 1884.

Upon that event *Barumal* renewed his demands for the payment of his debt, and not being able to get it, he, in conjunction with his wife *Basso*, instituted the present suit on the 10th of September, 1884. He is since dead, and his sons have been substituted for him as co-Plaintiffs with the widow. In his plaint

he states the deed of the 1st of September, 1879, and alleges that, in the preparation of the deed, *Dhum Singh* took steps contrary to the engagement, that so disputes arose, that *Dhum Singh* unjustly brought a claim for enforcement of the contract, but that the claim was dismissed by the High Court, who held the contract to be invalid. He then claims that the amount for which *Dhum Singh* had given credit to him in the sale-deed ought to be refunded, and claims interest upon it.

Dhum Singh's defence is that *Barumal* always denied the existence of a contract; that the High Court held there was no contract; that the character of the debt never was altered; and that there was nothing to save it from being barred by limitation.

The High Court hold that this defence is sound in law, and their decree dismisses the suit as being barred by limitation. They do not state under which article of Act XV. of 1877 the case falls; but they consider *Barumal's* claim to be for nothing but the old balance due from *Dhum Singh*. Probably they would hold it to fall, as was argued at their Lordships' bar, under art. 64 (in the second schedule); therefore, as none of the statutory provisions by which the time for suing is enlarged can be applied to this case, except that which relates to acknowledgment, and as no written acknowledgment can be found later than the plaint filed by *Dhum Singh* in the specific performance suit, *Barumal's* right to sue would be barred at latest long before he sued.

Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants, that there was a contract made between them, and that among its terms were the sale of the villages for Rs.55,000, the retention by *Dhum Singh* of his debt of Rs.33,359. 3*a*. 6*p*. as part payment, and the payment by *Barumal* of the balance. Their quarrel was about other matters. *Dhum Singh* alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. *Barumal* alleged that there were other terms, accused *Dhum Singh* of dishonesty, and after a time claimed the right of receding from the bargain

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altogether. But the Subordinate Judge took the view of *Dhum Singh*, and decreed completion of the contract according to that view. Up to the date of the Subordinate Judge's decree in 1881, *Dhum Singh* retained the amount of his debt as of right, and in accordance with the contract alleged by him. After the decree of 1881 he still retained it as of right, and with a title which could not be disputed in any Court of Justice, except by the one mode of appeal from the decree of 1881. *Barumal* might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after the decision of the appeal in the specific performance suit. *Dhum Singh's* defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.

In their Lordships' view the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on *Dhum Singh*. He was now no longer in the position of being able to allege that his debt to *Barumal* had been wiped out by the contract, and that instead thereof *Barumal* was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the *Contract Act*, IX. of 1870, or according to the terms of the *Limitation Act*, XV. of 1877.

By the 65th section of the *Contract Act*, "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it." In this case there

most certainly was an agreement, which, as written, was in the terms alleged by *Dhum Singh*. But it was held not to be enforceable by him because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so when the High Court decreed it to be so. The advantage received by *Dhum Singh* under it was the retention of his debt. Therefore by the terms of the statute he became bound to pay his debt on the 14th of March, 1884.

Trying the case by the terms of the *Limitation Act*, their Lordships think that it falls within art. 97. An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a Court of Justice authorized the retention, and in effect substituted the land for the debt. *Dhum Singh* retained the money, and *Barumal* lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to *Barumal's* own reluctance to take it under the conditions insisted on by *Dhum Singh*.

The result is that in their Lordships' opinion the High Court ought to have sustained the Subordinate Judge's decree, and to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to reverse the decree of the High Court, and to make an order to that effect. The Respondent must pay the costs of the appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondent: *Barrow & Rogers.*

J. C.*
1888
March 20, 22, 23, 24; April 19, 20, 21, 24; June 23.

MOULVI ABU MAHOMED ABDOOL KADER AND OTHERS . . . . . } DEFENDANTS;

AND

SRIMATI AMTAL KARIM BANU AND SRIMATI AMTAL KADER BANU . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ratification—Acquiescence—Lapse of Time.

Held, that the Plaintiffs having allowed twenty years to elapse after attaining their majority without taking any steps to set aside a solehnamah which the evidence shewed had been acted upon whereby their mother purported to convey away their shares in their father's estate, it was too late for them to question the validity of the transaction on the ground either of the mother having had no power to convey or of the solehnamah having been prejudicial to their interest. Independently of the law of limitation, such lapse of time is evidence of ratification.

APPEALS from two decrees of the High Court (April 13, 1885).

The two Respondents brought separate suits, each of them making the other a party-Defendant, in the Court of the Subordinate Judge of *Dacca*, which, on the 20th of November, 1883, gave them decrees for portions of their claims, and dismissed the rest.

The High Court reversed the dismissal, and held the Plaintiffs entitled to the relief prayed by them.

The facts are stated in the judgment of their Lordships.

Doyne, for the Appellants, contended that on the weight and effect of evidence the judgment of the lower Court was to be preferred to that of the High Court. As to the solehnamah, it was proved to have been executed by the Plaintiffs' mother and guardian; there was no ground for holding that the Plaintiffs were injured thereby; the long delay was evidence of acquiescence and ratification; the cause of action, if any, was barred by the Limitation Act, sect. 10 of which did not apply, as there

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

was no trust, collection of rents by a manager not involving a trust within that section: art. 62 of Act XV. of 1877. A manager collecting rents is not a trustee within sect. 10. In order to constitute a trust and a trustee the property must be vested in him. Here no property was vested in the manager. The elder brother acted on behalf of the younger brothers. The mother was guardian of the younger brothers, and it was her duty to protect their interests. There was no express trust, and a constructive or implied trust would not avail: see art. 127. The vesting is not satisfied unless there is an acceptance of the trust. Reference was made to Regulation III. of 1793, Act XIV. of 1859, Act IX. of 1871, and Act XV. of 1877. Act XIV. first introduced a clause excepting from limitation a suit to recover specific property the subject of a trust, see sect. 2; it is not sufficient to shew a bare fiduciary relationship in order to escape the bar. See *Ahmed Mahomed Pattel* v. *Adjein Dooply* (1); *Kherrodemony Dossee* v. *Doorgamony Dossee* (2); *Greender Chunder Ghose* v. *Mackintosh* (3); *Sarodapershad Chattopadhya* v. *Brojonath Bhuttacharjee* (4); *Manickavelu Abudali* v. *Arbuthnot* (5). As to the pottah in question, that is established in the evidence, and the Plaintiffs are shewn to have executed the mokhtarnamah to *Prannath Chuckerbutty*.

Graham, Q.C., and *Branson*, for the Respondents, contended that upon the evidence the mokhtarnamah authorizing *Prannath Chuckerbutty* to execute the daemi miras pottah was not proved to have been executed by the Respondents, or either of them. Both Courts found that the nature of the transaction was not explained to or understood by them so as to make the same binding, even if they had executed it. As regards the solehnamah, under the circumstances found by both the Courts, that would not be held to be binding on the Respondents. The mother was not entitled to convey as she purported to do; and it was made in disregard of the infants' interest. The suits, too, were not barred by limitation. The evidence was sufficient to establish

(1) Ind. L. R. 2 Calc. 323.
(2) Ind. L. R. 4 Calc. 455.
(3) Ind. L. R. 4 Calc. 897, 904, 911.
(4) Ind L. R 5 Calc. 911.
(5) Ind. L. R. 4 Mad. 404.

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a trust in the brothers who collected the rents of the property on behalf of those interested and who accordingly were liable to account in respect thereof. As to what will establish a liability to account reference was made to *Wall* v. *Stanwick* (1); *Hobbs* v. *Wade* (2); *Thomas* v. *Thomas* (3); *Hunocoomaree Dossee* v. *Turini Churn Bysack* (4); *Durga Prasad* v. *Asa Ram* (5).

Doyne, replied.

1888 June 23

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

These are consolidated appeals in two suits brought by the Respondents respectively against the Appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The Respondents (the Plaintiffs) are the daughters of *Moulvi Mahomed Idris*, who died at *Dacca* in December, 1845, by his second wife *Khadija*, who survived him. The Appellants *Abdool Kader* and *Abdool Rahman* are his sons by his first wife *Biju*, who died before him. By her he had also two daughters, *Amatulla* and *Amtal Rahman*, who survived him. At the time of their father's decease the Respondents were living with him at *Dacca*, and almost immediately afterwards they left *Dacca* with their mother *Khadija*, and went to live at the house of their maternal grandfather, and continued to live there until *Khadija* married again. From there, soon after her second marriage, the Respondents were removed by their brothers and were taken to the house of the brothers in *Sylhet*, where they lived until 1864. At that time, they being about twenty-two or twenty-three, and twenty or twenty-one years of age respectively, arrangements were made by their brothers for their marriages, and they were taken to *Dacca*, and fifteen or twenty days after their arrival there were married to their present husbands. From the death of *Mahomed Idris* the property left by him was managed by the elder brother, the first Appellant, and apparently by the younger, the second Appellant, also after he came

(1) 34 Ch. D. 763.
(2) 36 Ch. D. 554.
(3) 2 K. & J. 79.
(4) Ind. L. R. 8 Calc. 766.
(5) Ind. L. R. 2 Allah. 361.

of age, and the brothers received the rents and profits of the property.

In each of the suits the Plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by *Mahomed Idris*, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence. One, as to properties called in the plaint talooks Nos. 3 and 4, was founded upon a solehnamah, dated the 6th of January, 1847, made between *Abdool Kader* for himself and as guardian of his minor brother *Abdur Rahman* and his minor sisters *Amatulla* and *Amtal Rahman*, and *Khadija* for herself and as guardian of her minor daughters *Amtal Karim* and *Amtal Kader*. By this, after reciting that there was a dispute in respect of the immoveable property left by *Mahomed Idris*, for settling the dispute between them the parties made an amicable settlement to the effect that out of the talooks which were left by *Mahomed Idris* and detailed in a schedule, the talook No. 3, *Alum Reza*, bearing a jumma of Rs.1293 3*a*. 8*p*., and jummai land with nunkur and khanabari (homestead land) appertaining thereto, and talook No. 4, *Asadar Reza*, bearing a jumma of Rs.1400 11*a*. 11*p*., with jummai land and nunkur khanabari appertaining thereto in *Joar Baniachung*, zillah *Nabigunge*, and 2 annas share of the houses described, were given in lieu of a sum of Rs.11,250, with interest, on account of the dower of the deceased mother of *Abdool Kader* and his minor brother and sisters, which was due to them from their father, by *Khadija* on her own account and as guardian of her daughters, and the said property was made over to them; and talook No. 9, *Mahomed Manwar*, bearing a jumma of Rs.343 12*a*. 3*p*., and the jummai land and nunkur khanabari in proportion to the aforesaid jumma, and talook No. 11, *Mahomed Mansoor*, bearing a jumma of Rs.168 1*a*. 8*p*., with jummai land and nunkur khanabari appertaining thereto in pergunnah *Langla*, which were covered by the kabinnama of *Khadija*, were given to her by *Abdool Kader*, and other land in the talooks mentioned, was divided by giving to

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Abdool Kader and his minor brother and sisters 10½ sixteenths as their share, and to *Khadija* and her daughters 5½ sixteenths as their share.

The other ground of defence was that the Plaintiffs having been married and settled to live permanently at *Dacca*, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jumma, of their shares of the properties left by their father, and the brothers (the Appellants) agreed to take it on the condition of paying Rs.100 a month, Rs.50 being paid to each of the Plaintiffs.

Their Lordships will first take the case of the solehnamah. It is dated the 6th of January, 1847, and thus was made two years after the death of *Mahomed Idris*. It was found by the Subordinate Judge to have been executed by *Najumul Hossein*, the father of *Khadija*, and that he had power to execute it on her behalf. It was argued by the learned counsel for the Respondents that *Khadija* had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned counsel for the Appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that *Khadija* had had the benefit of good and independent advice, but that the Defendants had failed to prove that the solehnamah was beneficial to the Plaintiffs. He held, however, that the Plaintiffs, having allowed twenty years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court on appeal from the decrees which he made held that the transaction was not binding on the Plaintiffs, especially in the absence of evidence to shew that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnamah did not bar the right of the Plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance

with it. That *Khadija* took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the talooks Nos. 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the Plaintiffs had shares, and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that *Khadija* had no power to transfer the Plaintiffs' shares, or that they might have had the solehnamah set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court in dealing with this made no distinction between the talooks 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the Defendants were as agents and trustees in possession of and managing the property on behalf of the Plaintiffs. This may have been the case after *Khadija's* second marriage and the Plaintiffs being taken to the brothers' house, but there is no evidence that the brothers should be regarded as trustees for the Plaintiffs at the time of the execution of the solehnamah. Sect. 10 of Act XV. of 1887 is therefore not applicable, and it is unnecessary for their Lordships to put a construction upon this section. It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnamah, the suits are barred by the law of limitation.

The defence under the daemi miras ijara pottah, or perpetual lease, has now to be considered. The case of the Defendants is that the Plaintiffs executed a mokhtarnamah, dated the 7th Bhadro 1271 (22nd of August, 1864), by which, reciting that they had inherited from their father 3½ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers *Abdool Kader* and *Abdur Rahman*; they appointed *Moonshi Prannath Chuckerbutty* as a mokhtar for the purpose of signing their names on the perpetual miras ijara pottah, and causing registration of the same. And that, on the 26th of August, 1864, *Prannath Chuckerbutty* signed their names to a daemi miras ijara pottah of the talooks mentioned in the schedule

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to it, at an annual rent of Rs.1200, namely Rs.600 on account of the share of each, to be paid by instalments of Rs.600, and the document was registered.

There is now no dispute as to the execution of the pottah by *Prannath Chuckerbutty*. The material question is whether the mokhtarnamah was executed by the Plaintiffs. It is attested by five witnesses of whom only two were examined, and the absence of the others was not in any way accounted for. Of one of the witnesses examined, *Chamu Bibi*, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance, recollect the execution of the mokhtarnamah so circumstantially as it was described by her. It seems to me as very probable that her knowledge of the details was not derived entirely from her memory. That circumstance, together with the dependence of the witness on the Defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, *Masudar Reza*, had been in the service of the Defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis put their marks on that mokhtarnamah. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of *Kumartoli*, and one of the witnesses not examined is described as inhabitant of *Kumartoli* in *Dacca*. The pottah is attested by nine witnesses, three of whom are described as of *Kumartoli*, and others as being at *Dacca*. If the mokhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom *Masudar Reza* spoke.

The other evidence to prove its genuineness consisted of an order dated the 22nd of August, 1864, signed by Mr. *Pennington*, Principal Sudder Amin, on the back of the mokhtarnamah, stating that it had been produced "to-day" by *Moonshi Giasuddin*, mohurir, and, as an inquiry was necessary, ordering the nazir to make it; and a report of the nazir, also on the back of

it, dated the 23rd of August, which stated that he went to the residence of the Plaintiffs, and that they were identified by their relations *Khaja Abdoolla*, *Khaja Abdool Wajed*, and *Khaja Abdool Nubbi*, and admitted the execution of the mokhtarnamah and agreed to its terms. *Mahomed Yusuf*, the nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing, but he could not swear it to be genuine or not. On the next day, the 23rd, the mokhtarnamah was ordered to be given back to the man who presented it, namely *Giasuddin*. As Principal Sudder Amin, Mr. *Pennington* had no authority to order the inquiry to be made. *Giasuddin* was a mohurir of the Court of the First Subordinate Judge and general mokhtar of the Defendants, and Mr. *Pennington* may have thought that the mokhtarnamah was for business in the Court. The High Court properly held that the report was not by itself evidence of the facts stated in it. *Khaja Abdoolla* and *Abdool Wajed* were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it, and he saw them signed. It was said by *Khaja Abdoolla* that *Prannath Chuckerbutty* was present when the mark signatures were put and when the nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the Defendants' case, raises a strong suspicion against it. A number of receipts were produced by the Defendants appearing to be given by *Amtal Kader* each for sums of Rs.50. They contained a statement that she had given a lease in perpetuity to her brother *Abdool Kader* and others, in lieu of a salary or allowance of Rs.50 as malikana money, and acknowledged the receipt of Rs.50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the Defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts shewing that rent had been paid to

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the Plaintiffs. Thus *Abdool Wajed's* evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the Defendants had succeeded in proving the execution of the mokhtarnamah, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules to the plaint did not appear to be covered by the miras pottah, and he gave the Plaintiffs a decree for those properties with proportionate costs, and dismissed the suits as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the Plaintiffs by the Lower Court, they were entitled to shares of the remaining properties other than the talooks 9 and 11, which were allotted to *Khadija* by the solehnamah, and had been sold, and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereinafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two talooks, and to a share of the surplus profits of the properties in the first schedule, other than the said two talooks, from December, 1845, to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the Plaintiffs had, up to November, 1881, been receiving Rs.1200 annually. Their Lordships think the evidence of *Abdool Wahed*, the husband of *Amtal Karim*, shews that this sum was agreed to be taken as the Plaintiffs' share of the profits, and was so received by them until they asked, in November, 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships therefore consider that the accounts decreed by the High Court should only be taken from November, 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the talooks Nos. 3 and 4 which were included in the solehnamah, and ordering the accounts to be taken from November, 1881, instead of December, 1845. They will humbly advise Her Majesty accordingly. As

to the costs of these appeals, they think the partial success of the Appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Solicitors for the Appellants: *Wrentmore & Swinhoe.*
Solicitors for the Respondents: *Watkins & Lattey.*

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ACT VIII. OF 1859, s. 7: *See* RES JUDICATA. 1.

ACT XIV. OF 1859, s. 1, cl. 13: *See* LIMITATION. 2.

ACT I. OF 1869.] *Held*, that the expression "Maharani Sahiba," according to the true construction of the will in which it was contained, was not a collective term comprehending both widows of the testator, but applied to the senior widow alone, except where the expression was qualified so as to leave no doubt that both were intended:—*Held*, further, that extrinsic evidence of the testator's intention ought not to be admitted. That construction should be adopted which gives effect to the more reasonable and probable intention, having regard to the scheme of the will and the circumstances of the testator.—*Abbott* v. *Middleton* (7 H. L. C. 89) approved.—*Held*, that a junior widow's right to succeed to a life estate in her husband's talookdary property expectant on the determination of the senior widow's life estate therein, but subject to be defeated by a valid adoption, is an interest in such estate within the meaning of Act I. of 1869, s. 13, sub-s. 1.—Although the suit by the junior widow prayed for possession and partition, their Lordships, while dismissing the suit upon that footing, declared the Plaintiff to be entitled to the annuity directed by the will as and for her maintenance, and further declared that it was chargeable upon and payable out of the entirety of the testator's estate, talookdary as well as non-talookdary. MAHARANI INDAR KUNWAR AND UDIT NARAYAN *v.* MAHARANI JAIPAL KUNWAR - - - - - 127

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—— **s. 311**; *See* PRACTICE. 2.

ADOPTION OF ONLY SON: *See* HINDU LAW. 4.

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3. —— A conditional grant of villages to

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INCONSISTENT ISSUES DISAPPROVED: *See* MAHOMEDAN LAW.

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LIMITATION—*continued.*

Indian Contract Act, a fresh obligation on the Respondent to pay his debt; in the alternative it imported, within the meaning of art. 97 of Act XV. of 1877, a failure of the consideration which entitled him to retain it. MUSSAMAT BASSO KUAR *v.* LALA DHUM SINGH - - - - 211

MAHOMEDAN LAW.] Case where it was held upon the evidence, overruling the judgment of the High Court, that a hibbanama which the plaint alleged to be a forgery was a genuine document, that it was executed by a purdanashin lady, who well knew what she was doing, and was bound thereby.—Where a Plaintiff sues alleging that a deed purporting to be executed by herself is a forgery, the Court ought not to admit the inconsistent issue whether it was executed under undue influence.—But where the issue of undue influence is rightly raised, the Court should consider (1), whether the transaction is a thing which a right-minded person could be expected to do; (2) whether it was improvident; (3) whether legal advice if wanting was necessary; (4) whether the transaction originated with the donor.—Where one of three Mahomedan co-sharers gives his share before division to either of the other two, such gift is not invalidated by the doctrine of Moosháá.—Where a gift is public and authorizes the donee to take possession, which is in fact taken subsequently, the gift is not invalidated because the donor was not at the time in possession, and did not, therefore, at the time transfer it.—*Kali Das Mullick* v. *Kanhya Lal Pundit* (Law Rep. 11 Ind. Ap. 218) followed. MAHOMED BUKSH KHAN *v.* HOSSEINI BIBI - 81

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PROPERTY SUBJECT TO RELIGIOUS TRUSTS: *See* SALE IN EXECUTION. 1.

PURCHASE BY DECREE-HOLDER: *See* SALE IN EXECUTION. 2.

PURCHASE PENDENTE LITE.] Where a zemindar grants a putni and subsequently mortgages the zemindary interest to the putnidar, who obtains a decree against the zemindar, and at a sale in execution thereof buys the zemindary interest, subject to the mortgage:—*Held*, that a purchaser from the zemindar *pendente lite* is bound by such sale; and that a rent suit by such purchaser having been dismissed his subsequent redemption suit was barred as *res judicata*. RADHAMADHUB HOLDAR *v.* MONOHUR MOOKERJI - - - 97

RATIFICATION.] *Held*, that the Plaintiffs having allowed twenty years to elapse after attaining their majority without taking any steps to set aside a solehnamah which the evidence shewed had been acted upon whereby their mother purported to convey away their shares in their father's estate, it was too late for them to question the validity of the transaction on the ground either of the mother having had no power to convey or of the solehnamah having been prejudicial to their interest. Independently of the law of limitation, such lapse of time is evidence of ratification.

RATIFICATION —*continued.*

MOULVI ABU MAHOMED ABDOOL KADER *v.* SRIMATI AMTAL KARIM BANU - - - - 220

RELIEF GRANTED WHILE PRAYER OF THE PLAINT DISMISSED: *See* ACT I. OF 1869.

RES JUDICATA.] In a suit in 1883 to redeem a mortgage made in 1853 of certain villages in *Oudh* subsequently included in the talukdari sanad of the Respondent, it appeared that in 1864 the Plaintiff's ancestor had sued in the Settlement Court to redeem the same mortgage, which suit had been dismissed under sect. 114 of Act VIII. of 1859:—*Held*, that although the suit in 1864 prayed for sub-proprietary right and the suit in 1883 for superior proprietary right the difference was solely with regard to the mode of relief, and the cause of action being in either case substantially the same, viz., for redemption of a mortgage, the latter suit was barred. THAKUR SHANKAR BAKSH *v.* DYA SHANKAR - - - 66

2. —— A suit by the Respondent in 1866 to establish sub-proprietary right as against the talukdar having been dismissed, and a later suit to recover the same property from the talukdar under the terms of Circular No. 106, of 1869, *i.e.*, on repaying to the talukdar the arrears of revenue which he had paid to the Government, having also been dismissed:—*Held*, that, a third suit to redeem the same property under a mortgage deed was not barred as *res judicata*, under sect. 13 of Act X. of 1877 as amended by sect. 6 of Act XII. of 1879. Nor did the claim to redeem under the deed arise out of the former cause of action within the meaning of sect. 7 of Act VIII. of 1859. And the Plaintiff not then being aware of his right, it could not be regarded as a "portion of his claim" within the said section. AMANAT BIBI *v.* IMDAD HUSAIN - - - - 106

3. —— *Held*, that a suit founded entirely on an appointment in Plaintiff's favour, made in pursuance of a will of the deceased owner which had been declared to be revoked in a previous suit to which the Plaintiff was a party, is barred as *res judicata*:—*Held*, further, that the Plaintiff having claimed under the will, could not be allowed to shift his ground and recover the property as being entitled thereto under a conveyance made by one entitled under the deceased owner's intestacy. TRILOKINATH SINGH *v.* PERTAB NARAIN SINGH 113

4. —— To a suit by reversionary heirs of the husband for a declaration that the widow's gift of her husband's estate was inoperative, the Defendants pleaded that it was barred, and it appeared that two of the Plaintiffs had, prior to the gift, and alleging the widow's intention to sell or mortgage, sued for a declaratory decree and an injunction, and that their suit had been dismissed in terms of sect. 102, Act X. of 1877:—*Held*, that this suit was not barred by sect. 103, being founded upon a different and subsequent cause of action. MUSSUMMAT CHAND KOUR *v.* PARTAB SINGH 156

5. —— In a suit by the daughter and heir-at-law of a testator for relief founded on the alleged invalidity of the will, it appeared that the Defendants had in a former suit against the Plaintiff obtained a decree in favour of the genuineness

RES JUDICATA—*continued.*

and validity of the will:—*Held*, that by sect. 13 of Act X. of 1877 the present suit was barred. SRIMATI KAMINI DEBI *v.* ASUTOSH MOOKERJEE [159

—— *See* PURCHASE PENDENTE LITE.

6. —— Estoppel by judgment results from a matter having been directly and substantially in issue in a former suit, and having been therein heard and finally decided. In order to see what was in issue the judgment must be looked at; the decree is usually insufficient for that purpose. —Where the decree in a former suit as explained by the judgment was to the effect that the plaintiff was not entitled in that suit to the relief prayed for, and was not then entitled to possession of the property claimed:—*Held*, that a subsequent suit for possession was not barred thereby under sect. 13 of Act XIV. of 1882. KALI KRISHNA TAGORE *v.* SECRETARY OF STATE FOR INDIA - - - - - - - 186

REVIVOR: *See* PRACTICE. 3.

SALE IN EXECUTION.] Where property had been devised to a trustee with the object of providing for certain religious duties, *held*, that neither the whole nor any portion of the *corpus* could be sold in execution of a decree against the trustee personally.—*Held*, further, that in a suit to set aside such execution in which all parties interested are not present, the Court cannot decide as to the extent of the religious trusts, or whether any surplus profit belongs to the trustee, nor allow any specific portion of the *corpus* of the estate to pass to a purchaser as representing such unascertained surplus. BISHEN CHAND BASAWUT *v.* SYED NADIR HOSSEIN - - 1

SALE IN EXECUTION—*continued.*

2. —— Decree-holders who purchase under their own decree, which is afterwards reversed on appeal, stand in a different position from strangers who purchase thereunder *bonâ fide*, while the decree and the order for sale are valid. The latter have only to ascertain that the decree and order are valid and they are entitled to retain their purchase; the former lose the benefit thereof on the reversal of their decree. NAWAB ZAIN-UL-ABDIN KHAN *v.* MUHAMMAD ASGHAR ALI KHAN - - - - - - - 12

SALE OF GHATWALI TENURE IN EXECUTION: *See* GHATWALI TENURES.

SEPARABLE PROVISIONS AS TO GIFT OVER: *See* HINDU LAW. 1.

SON'S PROPERTY AT BIRTH IN ANCESTRAL ESTATE DEPENDENT ON HIS RIGHT TO PARTITION: *See* MITAKSHARA LAW.

SUIT AGAINST HINDU WIDOW AS REPRESENTING HER HUSBAND'S ESTATE: *See* HINDU LAW. 5.

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